

1999 DRAFTING REQUEST

Bill

Received: **08/20/1999**

Received By: **kuesejt**

Wanted: **Soon**

Identical to LRB:

For: **Kevin Shibilski (608) 266-3123**

By/Representing: **Dan Kursevski**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact: **Claims Board**

Alt. Drafters:

Subject: **State Finance - claims agnst st**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Terrence Bauer claim

Instructions:

See Attached.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/2	kuesejt 02/22/2000	gilfokm 02/22/2000	jfrantze 02/23/2000	_____	lrb_docadmin 02/23/2000		State

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/3	kuesejt 03/20/2000	gilfokm 03/20/2000	martykr 03/20/2000	_____	lrb_docadmin 03/20/2000	lrb_docadmin 03/22/2000	

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Page 2

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2/23 To/KH
<END>

2nd copy sent 09-23-99 (AM)

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FE Sent For:

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Central Wisconsin Inspection Service Inc.

3108 County Road K Custer, WI 54423-9697 Phone: (715) 341-1270

August 5, 1999

Senator Kevin Shibilski
PO Box 7882
Madison, WI 53707-7882

To Jeff Kensel
From Dan Kuscevski
266-3123
Senate Shibilski Staff


Senator Shibilski,

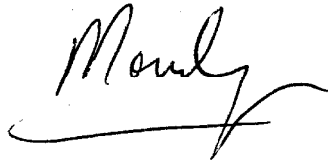
This letter is a follow-up to our request for the legislation your office is drafting and presenting this summer on claims denied by the Claims Board for CWI and Terry Bauer. We have just received a notice of a status conference (attached) on this issue called by Judge Richard Callaway for September 27, 1999. At the prior status conference on April 5, 1999, it was indicated to the court that your office was presenting the needed legislation this summer. That information was taken from conversations with your office just prior to the conference called by Judge Callaway. We are now facing another status conference and respectfully request a copy of the bill and a timeline for action on it to show the court that indeed your office has been acting on our behalf. We hope that you can find time in the very near future and respond to this request.

We wish to thank you for your efforts to date on our behalf and again stress the importance of your support to us. We believe that you have all the necessary documents and information to finish the process since you have requested no further information from us. We continue to need your assistance, and wish to again offer to do any additional action steps necessary to assist the process.

We appreciate your efforts and again wish to thank you for your continued support and assistance.

Yours for Quality Inspections,


Terry Bauer





Central Wisconsin Inspection Service Inc.

3108 County Road K Custer, WI 54423-9697 Phone: (715) 341-1270

FACSIMILE TRANSMISSION

DATE: August 17, 1999

TO: Senator Kevin Shibilski
ATTN.: Dan Kurseuski

Fax Number: (608) 267-6797

FROM: Terry Bauer

Fax Number: (715) 341-2009

NUMBER OF PAGES:
(Including cover sheet) (2)

COMMENTS

Sirs;

Attached you will find a letter to address the needed information requested by Dan Kurseuski today. Thank you for your consideration.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAMED ABOVE. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, disclosure, dissemination, distribution or copying of this message or the taking of any action in reliance on its contents, is strictly prohibited. If you have received this communication in error, please notify us immediately at (715) 341-1270. Thank you.

Central Wisconsin Inspection vs State of Wisconsin et al

NOTICE OF HEARING

Case No.: 96CV002365

CHRISTOPHER J DODGE
1 S PINCKNEY ST STE 410
PO BOX 927
MADISON WI 53701-0927

This case is scheduled for: **Status conference**

Date: Sep 27, 1999

Time: 01:30 pm

Court Official: Richard J. Callaway, Judge

Location: City-County Bldg., Room 231
Circuit Court Branch 6
Madison, WI 53709
266-4321

Re: Other contracts

This matter will not be adjourned by the court except upon formal motion for good cause shown or with the specific approval of the court upon stipulation by all parties.

Dane County Circuit Court

Date: 07-30-1999

**If you need help in this matter because of a disability, please call 608-266-4678
TTY 608-266-4625**

DISTRIBUTION:

Court Original
Christopher J Dodge
Paul L Barnett



Central Wisconsin Inspection Service Inc.

3108 County Road K Custer, WI 54423-9697 Phone: (715) 341-1270

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TO: Senator Kevin Shibilski
ATTN.: Dan Kurseuski

Fax Number: (608) 267-6797

FROM: Terry Bauer

Fax Number: (715) 341-2009

NUMBER OF PAGES:
(Including cover sheet) (11)

COMMENTS

Sirs:

Attached you will find the additional information requested by Dan Kurseuski per his phone call today. I attach the cover letter and 9 pages from the claims board hearings conducted October 14, 1997. Thank you for your consideration.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAMED ABOVE. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, disclosure, dissemination, distribution or copying of this message or the taking of any action in reliance on its contents, is strictly prohibited. If you have received this communication in error, please notify us immediately at (715) 341-1270. Thank you.

received
 11/10/97

STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings at 119 Martin Luther King Jr. Blvd., Madison, Wisconsin on October 14, 1997, upon the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. William J. Deppen	Department of Administration	\$1,533.32
2. Gary Heinrichs	Department of Administration	\$1,776.13
3. Cleansoils Wisconsin, Inc.	Department of Transportation	\$175,695.00
4. Lulloff's Used Cars	Department of Transportation	\$12,850.36
5. Terrence P. Bauer	Department of Commerce	\$149,511.92
6. Central WI Inspection Services	Department of Commerce	\$1,049,057.00
7. Paul B. Cogswell	Department of Revenue	\$2,678.76
8. Robert Wilkes	Department of Revenue	\$5,429.11
9. Bank of Homewood	Department of Natural Resources	\$178,548.40

In addition, the following claims were considered and decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
10. Vera J. Cross	Department of Administration	\$190.73
11. Gerald H. Herbst Jr.	Department of Transportation	\$2,988.60
12. Gloria S. Martell	Department of Health & Family Services	\$231.79
13. Thomas C. Smith	Department of Corrections	\$1,188.72

In addition, the following claims, previously presented at hearing, were considered and decided:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
14. InterCon Construction, Inc.	Department of Natural Resources	\$5,897.17
15. Milwaukee Police Association	State Ethics Board	\$4,500.00
16. Annie J. Daniel	Department of Health & Family Services	\$5,000.00

The Board Finds:

1. William J. Deppen of Madison, Wisconsin claims \$1,533.32 for automobile damage allegedly caused by an accident in a state parking lot. The claimant is employed by the University of Wisconsin. The Department of Administration requested the University's assistance with a project at the Badger Road State Office Building. The claimant was scheduled to assist with this project on the afternoon of May 21, 1997. He had planned on using a UW staff vehicle to drive from his office to the Badger Road facility, however, as he was leaving, his supervisor called him into a meeting which did not adjourn until 3:40 p.m. Because he was leaving much later than originally planned, if the claimant had used a staff vehicle, which he would have had to return to the UW, he would have been late picking up his child from day care. The claimant's day care provider charges a \$1 per minute late fee; therefore, the claimant had no choice but to use his own vehicle. He parked his car in the visitor parking area at the Badger Road office and was in the building for approximately 15-20 minutes, during which time his car was apparently struck by another vehicle. When he returned to his car he noticed the damage but he was not certain to whom he should make a report and he had to leave to pick up his child, so he

STATE CLAIMS BOARD

OCTOBER 14, 1997

PAGE 3

of the actual 117,117 miles. In January 1995 the claimant purchased the truck from Patrick Pontiac. The claimant sold the vehicle to a Mr. Reinthaler for \$10,300. The truck had many mechanical problems and Mr. Reinthaler, who suspected that the actual mileage on the vehicle was more than 17,117, complained to the claimant and the Department of Transportation. The Department did an investigation and discovered the title error. The claimant bought the truck back from Mr. Reinthaler, reimbursed him for the taxes and fees and also for the repairs he made on the vehicle. The claimant requests reimbursement as follows: \$10,300 cost of the truck, \$515.00 sales tax, \$88.50 fees, \$1,769.50 for reimbursement of Mr. Reinthaler's repair bills. In addition, the claimant requests reimbursement for the interest that it is paying on the floor plan of the truck in the amount of \$126.72 per month. It has come to the Department's attention that Zale Company, the Illinois company that originally owned the truck, inadvertently checked the wrong box when reassigning the certificate of title. The Department admits there was negligence on its part for not properly processing the title as in excess of its mechanical limits, as indicated in error when Zale sold the vehicle. However, the claim is based on the belief that the claimant has a vehicle with over 100,000 miles, that he thought had original miles. We now know that the vehicle does in fact have the original miles on it. Therefore, the Department recommends denial of this claim. The Board concludes the claim should be paid in the reduced amount of \$5,000.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Transportation fund, unappropriated revenue.

5. Terrence P. Bauer of Custer, Wisconsin claims \$148,511.92 for loss of wages related to the loss of contracts by his business. Since 1993, the Department of Commerce and its predecessor, the Department of Industry, Labor & Human Relations had contracted with Central Wisconsin Inspection Services, Inc. (CWI) as a local program operator to perform tank inspection services. The claimant is one of the owners of CWI and before the creation of CWI, was employed by DILHR. Upon leaving his position with the state because of an alleged potential conflict of interest with his tank inspection business, the claimant entered into an agreement with DILHR. In this agreement DILHR stated it would not discriminate against CWI in any manner regarding CWI's contracts. The agreement also provided that DILHR would proceed with the award to CWI of tank inspection contracts for Bid #JK-1604 for all jurisdictions in which CWI was the low bidder. DILHR further agreed that if, for any reason, any contracts in the bid were not awarded when CWI was the low bidder, the claimant would be entitled to be reinstated to his civil service position with full wages and benefits for the period between his resignation and his reinstatement. On July 29, 1996, CWI was notified that its contracts were being terminated effective October 30, 1996. CWI claims that it became aware of a significant defect in DILHR's bid awarding process in September 1996. The claimant alleges that DILHR and Commerce failed to identify certain tanks within the category of federally regulated out of service or abandoned tanks, which should have been bid on and paid for. As a result, the claimant alleges that CWI was not awarded additional bid inspections contracts under Bid #JK-1604 where CWI was or would have been the low bidder. The claimant states that the loss of contracts by CWI has resulted in a loss of livelihood. Pursuant to his agreement with the state, the claimant requests reimbursement of full wages and benefits since his resignation from the state in the amount of \$149,511.92. The Department of Commerce recommends denial of this claim. The claimant's theory of breach of contract is that Commerce was required to retroactively reassess the impact of subsequent changes in the number of tanks registered within a certain category of tanks on bids that had been submitted one or more years before, and then to readjust the jurisdictions accordingly. Nothing within the resignation agreement or any other binding contract supports this interpretation of Commerce's obligation under the agreement. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is not one

STATE CLAIMS BOARD

OCTOBER 14, 1997

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for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

6. Central Wisconsin Inspection Services of Custer, Wisconsin claims \$1,049,057.00 for lost profits related to termination of tank inspection contracts with the Department of Commerce and its predecessor, the Department of Industry, Labor and Human Relations. Since July 1994 DILHR and Commerce have failed to award several bid inspection contracts under Bid #JK-1604 in jurisdictions where the claimant was the low bidder, in alleged breach of an agreement with Terry Bauer, one of the owners of the claimant company. As part of this agreement, DILHR agreed not to discriminate against the claimant in any manner regarding its contracts. On October 24, 1996, the claimant states that it first became aware of a significant defect in the bid awarding process conducted by DILHR and Commerce, in that DILHR and Commerce failed to identify a particular category of tanks, which should have been bid on and paid for. As a result, the claimant claims it was not awarded additional bid inspection contracts under Bid #JK-1604 where the claimant was or would have been the low bidder. Prior to October 1994, the claimant and other contractors had been charging a fee for the supervision of the removal of underground storage tanks. Thereafter a Cease and Desist Order regarding the charging of such fees was issued by DILHR. Subsequently, several appeals were filed by the claimant and others regarding said Cease and Desist Order, which continues to date. In July 1996 the claimant was notified that its contracts were being terminated effective October 30, 1996. The claimant alleges that this termination is the culmination of a pattern of disparate and discriminatory treatment of the claimant by various DILHR and Commerce employees, based on personal animosities against Terry Bauer and also in retaliation for the filing of a separate lawsuit by the claimant against DILHR. Further, the claimant alleges that by such actions, the state has breached the claimant's contracts with the Department of Commerce and have interfered with the claimant's contracts with DILHR. The claimant states that the loss of the contracts will render the business defunct, which will in turn, result in the loss of livelihood for the shareholders and employees of the claimant. The claimant seeks monetary compensation for all losses resulting from the alleged wrongful termination of its contracts. The Department recommends denial of the claim. The claimant's theory of breach of contract is that Commerce was required to retroactively reassess the impact of subsequent changes in the number of tanks registered within a certain category of tanks on bids that had been submitted one or more years before, and then to readjust the jurisdictions accordingly. Nothing within the resignation agreement or any other binding contract supports this interpretation of Commerce's obligation under the agreement. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

7. Paul B. Cogswell of Gurnee, Illinois claims \$2,678.76 for income taxes incorrectly submitted to the Wisconsin DOR by his employer. The claimant last lived in Wisconsin in 1986 and has since lived in Illinois. In 1989, the claimant's employer, Marshall Field's, made an error pursuant to a change in their payroll system and submitted the claimant's withheld taxes to Wisconsin. In 1991, the State of Illinois requested the 1989 taxes, which they had not received. The claimant paid the taxes to Illinois, however, he was not able to discover where his withholdings had gone because Marshall Field's was sold into new ownership and the needed records could not be located. The claimant had not been a Wisconsin resident since 1986 and, therefore, never thought that Wisconsin had received his withholdings. The claimant understands that section 71.75(2), Wis. Stats., states that a claim for refund must be made within four years, however, he points to the fact that these funds were not paid by a resident nor pursuant to the filing of a tax return by a legal resident of the state. The claimant therefore believes the funds should be considered escheatable property and remain in trust in perpetuity by Wisconsin pursuant to a request being made by the rightful owner for the return of the

STATE CLAIMS BOARD

OCTOBER 14, 1997

PAGE 8

full investigation of the matter and to present its legal and factual arguments to an independent hearing examiner. It could have sought review of any adverse decision of the Circuit Court and raised the same legal issues as in the above referenced case. It chose not to do so and instead, now seeks to substitute the Claims Board as its preferred forum. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. (Member Lee not participating.)

16. Annie Daniel of Racine, Wisconsin claims \$5,000 for attorney's fees incurred when the claimant was charged with abuse of a resident by the Racine County District Attorney. The Claimant is employed at Southern Wisconsin Center and was accused of striking a resident while on duty on October 9, 1992. She contracted with legal counsel for a flat fee of \$5,000 to defend her against the charge. The case was dismissed after a preliminary hearing on the grounds that the allegations were not plausible. The Racine County DA and the Department of Health & Family Services recommend denial of this claim. Under s. 775.11, Stats., the claimant is entitled to compensation only if she is found not guilty. The Board concludes the claim should be paid in the reduced amount of \$3,500 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Claims Board appropriation s. 20.505 (4) (d), Stats.

The Board concludes:

1. The claims of the following claimants should be denied:

William Deppen
 Gary Heinrichs
 Cleansoils Wisconsin, Inc.
 Terrence P. Bauer
 Central Wisconsin Inspection Services
 Paul B. Cogswell
 Bank of Homewood
 Vera J. Cross
 Gerald H. Herbst, Jr.
 Thomas C. Smith
 Milwaukee Police Association

2. Payment of the following amounts to the following claimants is justified under s. 16.007, Stats:

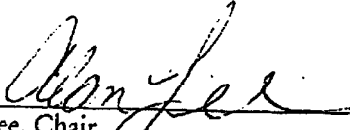
Luloff's Used Cars	\$5,000.00
Robert E. Wilkes	\$2,100.00
Gloria S. Martell	\$100.00
InterCon Construction, Inc.	\$4,000.00
Annie Daniel	\$3,500.00

STATE CLAIMS BOARD

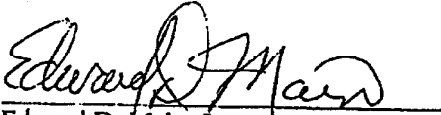
OCTOBER 14, 1997

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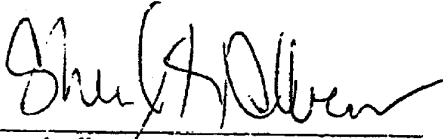
Dated at Madison, Wisconsin this 30th day of October 1997.



Alan Lee, Chair
Representative of the Attorney General



Edward D. Main, Secretary
Representative of the Secretary of Administration



Sheryl Albers
Assembly Finance Committee



Brian Burke
Senate Finance Committee

NOTICE OF EVENT GIVING RISE TO CLAIM
PURSUANT TO WIS. STAT. § 893.82

BY CERTIFIED MAIL

To: James E. Doyle, Jr.
Attorney General
Room 114 East
State Capitol
P.O. Box 7857
Madison, WI 53707-7857

Claimant: Terrence P. Bauer
3108 County Road K
Custer, WI 54423

PLEASE TAKE NOTICE THAT pursuant to § 893.82(3), Wis. Stats., Terrence P. Bauer, by his attorneys, Tomlinson, Gillman & Ridders, S.C., states as follows:

1. This is a claim for breach of contract, including claims for reimbursement of wages and benefits and reinstatement of employment.
2. Time of event giving rise to claim: unknown.
3. Dates of event giving rise to claim:
 - (a) 9/6/96 - date claimant first became aware of defect in bid awarding process.
 - (b) 10/30/96 - date of termination of contract.
4. Location of event giving rise to claim:

N/A - upon information and belief, both the bidding error and termination arose from actions taken by the Department of Commerce, and formerly by the Department of Industry, Labor and Human Relations, from its principal place of business located at 123 West Washington Avenue, Madison Wisconsin 53703. Claimant resided and was employed out of Custer, Wisconsin.
5. Names of persons/entities involved:
 - a. Terrence P. Bauer ("Terry Bauer");
 - b. Central Wisconsin Inspection Service, Inc. ("CWI");
 - c. State of Wisconsin;



- d. Wisconsin Department of Commerce; formerly Department of Industry, Labor & Human Relations;
 - e. Sheldon Schall;
 - f. William J. Morrissey;
 - g. Patrick Osborne;
 - h. Howard Bernstein; and
 - i. Bernard Coxhead
6. Circumstances of event giving rise to claim:
- a. Since December, 1993, the State of Wisconsin, through the Department of Commerce and its predecessor, the Department of Industry, Labor, and Human Relations ("DILHR"), has contracted with CWI as a local program operator to perform tank inspection services.
 - b. The claimant is one of the owners of CWI and, before the creation of CWI, claimant was employed by DILHR (the Department of Commerce's predecessor) as a Flammable and Combustible Liquids/System Coordinator. Upon leaving his position with the state because of an alleged potential conflict of interest with his tank inspection business, Mr. Bauer entered into an agreement, dated July 15, 1994, with DILHR. Such agreement is attached hereto as Exhibit A. Pursuant to the terms of such contract, DILHR agreed not to discriminate against CWI in any manner regarding CWI's local program operator contracts.
 - c. Further, pursuant to such agreement, DILHR agreed that it would proceed with the award to CWI of tank inspection contracts under a certain bid package known as "BID #JK-1604" for all jurisdictions in which CWI was the low bidder. DILHR further agreed that, if, for any reason, any contracts under bid package "JK 1604" were not awarded when CWI was the low bidder, Terry Bauer would be entitled to be reinstated to his civil service position with full wages and benefits for the period between his resignation and his reinstatement.
 - d. Since July 15, 1994, DILHR and its successor, the Department of Commerce, have failed to award several bid inspection contracts under BID # JK-1604 in jurisdictions where CWI was the low bidder, in breach of such agreement.

- e. On September 6, 1996, CWI first became aware of a significant defect in the bid awarding process conducted by DILHR and its successor, the Department of Commerce, in that DILHR and the Department of Commerce failed to identify certain tanks within the category of federally regulated out of service or abandoned tanks, which should have been bid on and paid for. As a result, CWI was not awarded additional bid inspection contracts under BID # 1604 where CWI was or would have been the low bidder. Examples of this include the following municipalities: Bagley, Coloma, Darlington, Fox Lake, Juneau, Montfort and Potosi.
- f. On July 29, 1996, CWI was notified that its contracts were being terminated, effective October 30, 1996. The termination notice was sent by the Department of Commerce, by letter dated July 29, 1996, and was received by CWI on July 31, 1996.
- g. Such termination did occur on October 30, 1996.
- h. Further, the state has breached or caused the breach of claimant's Local Program Operator agreement as well as the July 15, 1994 agreement, attached hereto.
- i. The loss of contracts by CWI has resulted in a loss of livelihood for the claimant.
- j. Pursuant to the agreement with the state, the claimant is entitled to return to his position with the state and is further entitled to reimbursement of full wages and benefits since his resignation from the state, calculated to date as follows:

1994	\$ 23,657.01
1995	62,514.92
1996	<u>63,339.99</u>
Total	\$149,511.92

Until reinstatement, such amount will continue to accrue.

By reason of the foregoing, the claimant, by his attorneys, demands that he be reimbursed full wages since resignation and be reinstated to his position by the state.

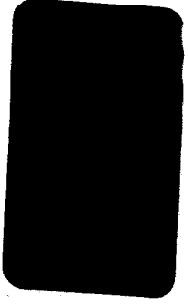
TERRANCE PETER BAUER
Lost Wages and Benefits

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>
	(07-16 to 12-31)			
	24 Weeks			
Wages:				?
40 hrs. X \$16.76 X 24 wks. =	\$ 16,089.60			
40 hrs. X \$16.76 X 26 wks. =		17,430.40		
40 hrs. X \$17.02 X 26 wks. =		17,700.80		
40 hrs. X \$17.02 X 26 wks. =			17,700.80	
40 hrs. X \$17.26 X 26 wks. =			17,950.40	
			<u>35,131.20</u>	
				?
Overtime (average):				
1.5 hrs per wk. X \$16.76				
X 1.5 X 26 wks. =	980.46			
8 hrs. per wk. X \$16.76				
X 1.5 X 26 wks. =		5,229.12		
8 hrs. per wk. X \$17.02				
X 1.5 X 26 wks. =		5,310.24		
8 hrs. per wk. X \$17.02				
X 1.5 X 26 wks. =			5,310.24	
8 hrs. per wk. X \$17.26				
X 1.5 X 26 wks. =			5,385.12	
			<u>46,346.56</u>	
Total wages	<u>17,070.06</u>	<u>45,670.56</u>	<u>46,346.56</u>	
Health Insurance	5/12 2,801.00	6,722.00	6,722.00	?
Income Continuation Insurance	22.00	52.00	52.00	?
Wisconsin Retirement				
14.4% of wages above	2,458.09	6,576.56	6,673.91	?
Employee share of FICA & Medicare				
7.65% of wages above	<u>1,305.86</u>	<u>3,493.80</u>	<u>3,545.52</u>	?
	23,657.01	62,514.92	63,339.99	

PLUS:

* Reinstatement of sick leave hours 402.18

* Credited for years of creditable service towards Wisconsin Retirement for 7-16-94 to date of reinstatement.





STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

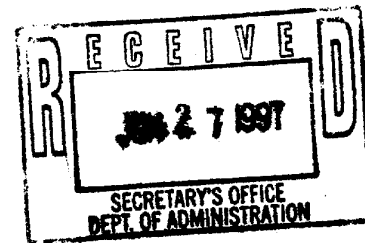
Paul L. Barnett
Assistant Attorney General
608/266-5366
Fax 608/267-2223
TTY 608/267-8902

June 27, 1997

HAND-DELIVERED

Ms. Patricia A. Reardon
Wisconsin Department of Administration
Claims Board
101 East Wilson Street, 10th Floor
Madison, Wisconsin 53703

Re: In the Matter of the Claim of
Terrence P. Bauer



Dear Ms. Reardon:

Please accept this letter as the response on behalf of the Wisconsin Department of Commerce to Terrence P. Bauer's claim for damages.

Accompanying this response letter are exhibits which support the factual propositions set forth in this letter. It is my belief that Mr. Dodge, CWI's attorney, has copies of them all. So I am not providing another set to him. But if I am wrong, then Mr. Dodge should contact me and I will gladly furnish him with a copy of whatever he does not presently have.

I EVENTS LEADING TO THE RESIGNATION AGREEMENT

In the late 1980s and early 1990s, Commerce (formerly the Wisconsin Department of Industry, Labor and Human Relations), following the promulgation of federal legislation and regulations, enacted administrative rules to govern its underground storage tank program. These rules, found at Wis. Adm. Code ch. ILHR 10, set forth standards which tank owners, installers and removers had to abide by. ILHR 10 also established standards for tank inspectors retained to enforce the code requirements. See Morrissey affidavit at ¶¶ 4-7

Initially, DILHR encouraged local municipalities to voluntarily participate in the inspection program. This required local municipalities to enter into contracts with qualified tank inspectors, called local program operators, to conduct inspections within the fire districts that fell within the jurisdiction of the local municipality. By 1991 it became clear that only some municipalities were willing to voluntarily participate. Morrissey affidavit at ¶ 13.

Ms. Patricia A. Reardon
June 27, 1997
Page 2

To ensure inspection coverage for the remainder of the state not covered by voluntary contracts with local municipalities, DILHR solicited bids from interested persons and firms to conduct inspections in the uncovered jurisdictions. This occurred during the spring of 1994. Morrissey affidavit at ¶ 14.

Terry Bauer was employed by the Wisconsin Department of Industry, Labor and Human Relations (now Commerce) until July 15, 1994. His title was Flammable and Combustible Liquids/Systems Coordinator. Bauer claim, exhibit A at ¶ 6b. Generally speaking, Bauer's duties included performing inspections of petroleum storage facilities, conducting investigations, and enforcing applicable regulations, including ILHR 10. See exhibit 70 at 2 (4/27/94 letter from Department of Employment Relations to Howard Bernstein).

Meanwhile, Central Wisconsin Inspections Services, Inc., was formed in late 1993. CWI's owners included Bauer, his wife and his daughter. CWI submitted bids in response to DILHR's solicitation. Review determined that CWI submitted the low bid for a number of jurisdictions. Transcript of Hearing on Motion for Preliminary Injunction (hereafter "transcript") at 19-20.

In response to an inquiry from DILHR legal counsel, the Wisconsin Department of Employment Relations declared that a conflict of interest existed in respect to Bauer's position with DILHR and his position as part owner of CWI. Exhibit 70. Relying on DER's decision, DILHR accordingly refused to award CWI any bids until the conflict was resolved. See Morrissey affidavit at ¶ 16.

On July 15, 1994, DILHR, Bauer and CWI entered into an agreement whereby Bauer agreed to resign his position with DILHR in exchange for DILHR's agreement to award CWI all of the contracts for which it was the low bidder. Exhibit 71 (7/15/94 agreement).

II THE RESIGNATION AGREEMENT

Several terms of the resignation agreement are involved in this claim. They include the following:

8. DILHR shall proceed with the award of tank inspection contracts under Bid # JK-1604 to CWI for jurisdictions in which CWI was the low bidder.

...

12. If for any reason the contracts referred to in ¶ 8 are not awarded to CWI [Bauer gets his job back] with

Ms. Patricia A. Reardon
June 27, 1997
Page 3

full wages and benefits for the period between his resignation and his reinstatement.

13. By accepting this agreement, . . . Bauer waive[s] any and all claims related to the award of the inspection contracts under bid # JK-1604 and Mr. Bauer's employment at DILHR

Exhibit 71.

III BID # JK-1604

A request for bids (RFB) was issued on March 11, 1994. Exhibit 76¹ (3/11/94 "Request for Bid for tank inspection Services"). Bids were due from vendors to DILHR by April 22, 1994. Exhibit 76 at 6.

The contract was described in the RFB document as a "base fee bid contract." Exhibit 76 at 4, § 1.6. Bidders were instructed to bid fees equal to or less than a fee schedule for different types of tanks set forth in the RFB. The different categories of tanks included "federally regulated in use"; "federally regulated temporarily abandon"; "heating fuel greater than 4,000 gallons; "heating fuel 4,000 gallons or less"; and "other ILHR 10 regulated". Id. Bids were solicited separately for each fire district for which a voluntary contract with a local municipality did not exist. All prospective bidders received a spreadsheet which identified, by fire district and by type of tank population, the number of tanks which DILHR's records showed were registered. Exhibit 76, attachment C (spreadsheets).

The RFB further provided that bids would be awarded to the lowest responsible bidder for each fire district. The successful bidder was determined by considering the bid price for the total

¹ Bauer's claim here overlaps to some extent with the separate claim filed by CWI. Although Commerce is responding separately to these claims, it will maintain a consecutive numbering system for the exhibits so as to avoid having two different documents marked with the same exhibit number. Thus, it may be that some exhibit numbers will be skipped in this response to Bauer's claim since documents marked with those numbers were submitted in response to CWI's claim but are not germane to the response to Bauer's claim.

Ms. Patricia A. Reardon
June 27, 1997
Page 4

number of tanks of all of the categories in each fire district. Exhibit 76 at 9, § 3.4.

The RFB also states that the initial payment to successful bidders "will be based upon the number of tanks registered the first month after the notice of intent to award contract is issued." Thereafter annual payments would be based on the number of tanks registered at the time of payment. Exhibit 76 at 4, § 1.6.

Finally, the RFB outlines an administrative appeals process which aggrieved bidders could pursue. Exhibit 76 at 9, § 3.6.

IV NOTICE OF INTENT TO AWARD BID

On June 16, 1994, DILHR issued a notice to CWI advising of the jurisdictions in which CWI was the low bidder.

V DISCUSSION OF THE BID TERMS AND THE RESIGNATION AGREEMENT

This RFB established a formula for making payments under the LPO contracts which depended not on the kind of work performed but instead on the number of tanks registered in each fire district for certain specified types of tanks. Exhibit 76 at 4, § 1.6. The scope of work was set forth elsewhere in the RFB and further described in the LPO contract, the administrative code, and bulletins and other communications issued by DILHR. See exhibit 76 at 4, § 1.4; attachment F at 3, § 8.0; and attachment I. Although LPOs like CWI were expected to carry out certain inspection and related activities for each type of tank within their jurisdictions, it was the number of tanks registered within these jurisdictions, and not the activities performed with respect to them, that drove the payment to which LPOs became entitled under the contract.

It thus becomes clear that the claimed failure on DILHR's part to identify certain tanks within one or more of the category of tanks for which bids were solicited is immaterial since payment was based on the number of tanks which DILHR's records showed were registered as of the date of payment. All bidding vendors operated from the same information regarding tank populations, and submitted their bids accordingly. Moreover, although the RFB provided for annual adjustments in payments based on adjustments made (up or down) to the number of registered tanks within a particular tank population, nothing in that document or elsewhere supports the implicit assertion that a future adjustment in this number required a retroactive reassessment of the award of jurisdictions.

Ms. Patricia A. Reardon
June 27, 1997
Page 5

Another point must be raised. At the time Bauer entered into the resignation agreement, July 15, 1994, the low bidder for each jurisdiction had already been determined. Bauer, through CWI, had been previously informed of those jurisdictions. Thus, the entire universe of jurisdictions for which CWI was low bidder was a known quantity to both DILHR and Bauer.

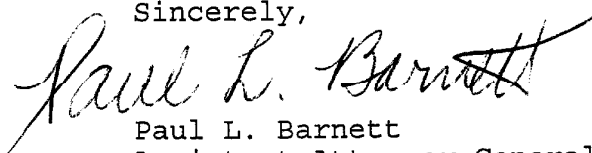
In this light, it is evident that a breach of paragraph 8, which under paragraph 12 triggers the reinstatement provision, could only have occurred if DILHR failed to award to CWI any of the jurisdictions for which CWI had previously been determined to be the low bidder. Bauer offers no facts to support such a conclusion.² From paragraph 6 e of the Notice of Events document attached to the claim for damages, Bauer's theory appears to be that some sort of retroactive recalculation of the tank populations on which bids were based, derived from future acquired information, entitled CWI to the award of additional jurisdictions which it did not receive. The language of the resignation agreement, however, simply does not support this construction.

VI CONCLUSION

The resignation agreement provided that CWI would be awarded the bids for all jurisdictions in which it had been determined to be the low bidder. Bauer's theory of breach is that Commerce was required to retroactively reassess the impact of subsequent changes in the number of tanks registered within a certain category of tanks on bids that had been submitted one or more years before, and then to readjust the jurisdictions previously awarded accordingly. Nothing within the resignation agreement, or any other binding contract, supports this interpretation of Commerce's obligation under the agreement.

Bauer's claim should be denied.

Sincerely,



Paul L. Barnett
Assistant Attorney General

PLB

² The Claims Board should require Bauer to produce whatever evidence he has which supports such a conclusion if that is his position.

Ms. Patricia A. Reardon
June 27, 1997
Page 6

enclosures
copy (without enclosures) to:
Christopher J. Dodge, Esq.
Kristiane Randal, Esq.

1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3478/lins
JTK.....

1999

STATE OF WIS
wanted Wed 9/22 AM

img

AN ACT relating to: expenditure of a sum sufficient from the general fund in payment of a claim against the state made by Terrence Bauer.

WIS
A

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Claim against the state. There is directed to be expended from the appropriation under section 20.505 (4) (d) of the statutes, as affected by the acts of 1997 and 1999, a sum sufficient in payment of a claim against the state made by Terrence Bauer, Custer, Wisconsin, equal to the cost of wages and benefits that would have been paid to or on behalf of the claimant from July 15, 1994 to the date of his reinstatement to his position as a state employe to compensate him for the breach of an agreement entered into between the claimant and the former department of industry, labor and human relations on July 15, 1994. Acceptance of this payment releases this state and its officers, employes and agents from any further liability resulting from this agreement.

(END)



1999 BILL

- 1 **AN ACT relating to:** expenditure of a sum sufficient from the general fund in
2 payment of a claim against the state made by Terrence Bauer.

Analysis by the Legislative Reference Bureau

This bill directs expenditure of a sum sufficient from the general fund in payment of a claim against the state made by Terrence Bauer against the department of commerce. The claimant was employed by the former department of industry, labor and human relations (DILHR) as a flammable and combustible liquid system coordinator. During that employment, the claimant became the owner of a company, Central Wisconsin Inspection Services, Inc. (CWI), that began bidding on requests for bids solicited by DILHR for underground storage tank inspections. After the department of employment of relations determined that this posed a conflict of interest, ~~the claimant~~ entered into an agreement with ~~DILHR~~ on July 15, 1994, under which ~~he~~ resigned his position with DILHR as of that date, and under which DILHR agreed that it would not discriminate against CWI in the award of any contracts for which CWI was the low bidder on a specific named bid number then pending and further agreed that if DILHR did so the claimant would be entitled to reinstatement with full wages and benefits retroactive to his date of termination. According to the claimant, DILHR and its successor, the department of commerce, have failed since July 15, 1994, to award several contracts to CWI when CWI was the low bidder or would have been the low bidder had the department of commerce properly categorized its work, and the department of commerce terminated its contracts with the claimant on October 30, 1996. According to the department, its alleged failure to describe certain tanks within certain categories in its bid

*the claimant
and CWI
= = =*

DILHR

*the
claimant*

BILL

solicitations is immaterial since payments are based on the number of tanks that are registered on the date of payment and all bidders operate from the same information. The department also alleges that its agreement with the claimant does not apply to the award of contracts for which bids were due to be filed after the date of the agreement. The claimant claimed \$149,511.92, which the claimant determined is the cost of the wages and benefits that he would have received for the period from July 15, 1994, to December 31, 1996, plus the cost of wages and benefits calculated by the same methodology to his date of reinstatement. On October 30, 1997, the claims board recommended denial of this claim (see 1997 *Senate Journal*, p. 334).

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1. Claim against the state.** There is directed to be expended from
2 the appropriation under section 20.505 (4) (d) of the statutes, as affected by the acts
3 of 1997 and 1999, a sum sufficient in payment of a claim against the state made by
4 Terrence Bauer, Custer, Wisconsin, equal to the cost of wages and benefits that would
5 have been paid to or on behalf of the claimant from July 15, 1994, to the date of his
6 reinstatement to his position as a state employe to compensate him for the breach
7 of an agreement entered into between the claimant and the former department of
8 industry, labor and human relations on July 15, 1994. Acceptance of this payment
9 releases this state and its officers, employes and agents from any further liability
10 resulting from this agreement.

11

(END)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3478/3dn

JTK.....

king

Senator Shibilski:

This redraft corrects the analysis to relect the fact that the department of commerce terminated its contracts with CWI, rather than with Terrence Bauer, and also updates the text to reflect the fact that the agreement dated July 15, 1994 was a three-party agreement. This information was added on the last redraft.

**Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778**



~~DAVID~~

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-3478/Z
JTK:kmg:jf

3

Wanted NE 3/21

1999 BILL

D-NOTE

1 AN ACT relating to: expenditure of a sum sufficient from the general fund in
2 payment of a claim against the state made by Terrence Bauer.

Analysis by the Legislative Reference Bureau

This bill directs expenditure of a sum sufficient from the general fund in payment of a claim against the state made by Terrence Bauer against the department of commerce. The claimant was employed by the former department of industry, labor and human relations (DILHR) as a flammable and combustible liquid system coordinator. During that employment, the claimant became the owner of a company, Central Wisconsin Inspection Services, Inc. (CWI), that began bidding on requests for bids solicited by DILHR for underground storage tank inspections. After the department of employment of relations determined that this posed a conflict of interest, DILHR entered into an agreement with the claimant and CWI on July 15, 1994, under which the claimant resigned his position with DILHR as of that date, and under which DILHR agreed that it would not discriminate against CWI in the award of any contracts for which CWI was the low bidder on a specific named bid number then pending and further agreed that if DILHR did so the claimant would be entitled to reinstatement with full wages and benefits retroactive to his date of termination. According to the claimant, DILHR and its successor, the department of commerce, have failed since July 15, 1994, to award several contracts to CWI when CWI was the low bidder or would have been the low bidder had the department of commerce properly categorized its work, and the department of commerce terminated its contracts with the claimant on October 30, 1996. According to the department, its alleged failure to describe certain tanks within certain categories in

CWI

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3478/3dn
JTK:kmg:km

March 20, 2000

Senator Shibilski:

This redraft corrects the analysis to reflect the fact that the department of commerce terminated its contracts with CWI, rather than with Terrence Bauer, and also updates the text to reflect the fact that the agreement dated July 15, 1994 was a three-party agreement. This information was added on the last redraft.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778

**SUBMITTAL
FORM**

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 03/20/2000

To: Senator Shibilski

Relating to LRB drafting number: LRB-3478

Topic

Terrence Bauer claim

Subject(s)

State Finance - claims agnst st

1. **JACKET** the draft for introduction _____



in the Senate or the Assembly _____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Jeffery T. Kuesel, Managing Attorney
Telephone: (608) 266-6778