



October 7, 2013

## Final Investigative Report Concerning Ombudsman Complaints 2013-0396 & 2013-0423

### COMPLAINT

Two Anchorage citizens contacted the Municipal Ombudsman stating that a Municipal Right of Way Enforcement Officer had informed them that they could not place canopies (tents) over their Downtown sidewalk vendor food carts during inclement weather, as it was prohibited by Municipal Code. The two citizens alleged that the City did not inform them of this prohibition during the Invitation to Bid process for their Downtown sidewalk locations.

### FINDINGS

These complaints against the Municipality of Anchorage, Community Development Department, Right of Way Division are **JUSTIFIED**.

### ANALYSIS AND CONCLUSIONS

In mid-August 2013 two Anchorage citizens who operate sidewalk vendor food carts in the Downtown Improvement District contacted the Municipal Ombudsman stating that a Municipal Right of Way Enforcement (ROW) Officer had informed them that they could not place canopies (tents) over their food carts during inclement weather, as it is prohibited by Municipal Code. The two citizens stated that they had been operating their food carts for several years and that the City had never informed them of this prohibition, including during the Invitation to Bid process for their Downtown sidewalk locations.

The City annually leases eight Downtown sidewalk locations to vendors through a competitive sealed bid process facilitated by the Purchasing Department. The sidewalk vendor permit program is currently managed by the Right of Way Division within the Community Development Department. The program has previously been managed by the Office of Economic and Community Development and the Municipal Manager's Office. Successful bidders can pay in excess of \$8000.00 for their locations.

The Ombudsman contacted Jack Frost, Chief, Code Enforcement who explained that A.M.C. 10.60.080.C.2 "Posting of licenses, permits and certificates; equipment," states that "An umbrella may be used in connection with a stand to protect merchandise from weather, but not to display merchandise. The umbrella shall not exceed ten feet in diameter when opened and ten feet in height. If a ten-foot umbrella is used, the umbrella shall be placed in the middle of the stand. Tarping or tenting above the stand is not allowed."

Frost informed the Ombudsman that during the previous two weeks ROW Enforcement Officer Frank Kelly had visited each of the Downtown sidewalk vendors to inform them of the requirement of A.M.C. 10.60.080.C.2, following a citizen complaint regarding one or more street vendors placing tents over their stands when it was raining. The Ombudsman verified that both of the complainants had been contacted by Officer Kelly, which is what precipitated their contacting the Ombudsman. While they

acknowledged that Officer Kelly had recently informed them regarding the code prohibitions on tenting over their stands, both alleged that they had not been informed regarding the prohibition during the invitation to bid process.

The Ombudsman reviewed A.M.C. 10.60.080, "Posting of licenses, permits and certificates; equipment," which details the equipment requirements, prohibitions and limitations for sidewalk vendors, including the maximum dimensions for their stands, the parameters for any stand umbrella, and the prohibition on using tenting over stands. The Ombudsman finds it perplexing that these requirements are still codified under Title 10, "BUSINESS LICENSES AND REGULATIONS", when other provisions of Title 10 pertaining to sidewalk vendors have been repealed and their provisions incorporated into A.M.C. 24.75, "SIDEWALK VENDORS."

A review of A.M.C. 24.75 revealed that this section of code does not contain any information regarding requirements, prohibitions and limitations for sidewalk vendor equipment as contained in A.M.C. 10.60.080, nor does it contain any reference to, or any footnote regarding, A.M.C. 10.60.080. If a citizen interested in bidding on a Downtown sidewalk vendor location proactively sought out A.M.C. 24.75, "SIDEWALK VENDORS", they would not find any equipment requirements, prohibitions or limitations listed in the chapter, nor any reference to the relevant section of code.

The Ombudsman reviewed the Invitation to Bid (ITB) documents for the 2013 sidewalk vendor permits (ITB No. 2013B012), and ascertained that the documents do not contain any reference to either A.M.C. 24.75 or A.M.C. 10.60.080. A citizen could potentially submit a winning bid of several thousand of dollars for a Downtown sidewalk vendor location without being provided the relevant code references regarding equipment requirements, limitations or prohibitions. And even if they proactively reviewed code, most would probably review A.M.C. 24.75, "SIDEWALK VENDORS," which does not contain the pertinent information.

In reviewing these complaints the Ombudsman had to try and balance the responsibility of citizens to inform themselves, especially when making a significant financial investment, with local government's responsibility to adequately inform citizens. It is not always easy to achieve this balance. In this instance the Ombudsman reached his decision primarily based on the fact that the pertinent code requirements are not easy to find, since they are located in a section of code where the average citizen would not expect to find them. While citizens have an obligation to inform themselves, the Municipality has an obligation to inform citizens, or to at least point them in the right direction. Although Officer Kelly personally informed all of the Downtown sidewalk vendors regarding the requirements of A.M.C. 10.60.080, this was several months after the conclusion of the ITB process. The Ombudsman can find no evidence that the Municipality provided pertinent information to bidders regarding the provisions of A.M.C. 10.60.080 (or A.M.C. 24.75) during the ITB process.

Although the Municipality did not adequately inform bidders regarding the provisions of the relevant sections of code, this omission does not make the code unenforceable, nor does it relieve successful bidders of their responsibility to follow the requirements of the code. Unfortunately for the complainants, the ROW Division cannot issue an exemption or special permit to allow them to place tenting over their stands in inclement weather this year; A.M.C. 10.60.080 specifically prohibits this. Any change to this requirement requires legislative action by the Anchorage Assembly. The complainants can petition the Assembly and Administration to amend the Code.



Because the Invitation To Bid documents for the 2013 Sidewalk Vendor Permits (ITB No. 2013B012) did not contain any reference to A.M.C. 10.60.080, "Posting of licenses, permits and certificates; equipment", and because A.M.C. 24.75, "SIDEWALK VENDORS", does not include any reference to the requirements of A.M.C. 10.60.080, the Municipal Ombudsman finds these complaints to be JUSTIFIED. A preliminary report regarding this matter was provided to Right Of Way. Based on the investigation of this case, the Municipal Ombudsman recommends the following:

(1) that Anchorage Municipal Code, Chapter 24.75, "SIDEWALK VENDORS", be amended to incorporate the provisions of Anchorage Municipal Code, Chapter 10.60.080, "Posting of licenses, permits and certificates; equipment". *The department will work on these code revisions.*

(2) that future Invitation To Bid documents for Sidewalk Vendor Permits include references to the relevant sections of Municipal Code governing the program, and include a copy of the section of code containing the information currently found in A.M.C. 10.60.080. *This will be addressed during the 2014 Invitation to Bid Process.*

Based on this finding and these recommendations, this case is closed.

If you object to the Ombudsman's decision to decline or discontinue this investigation or review, you may file a grievance with the Ombudsman as specified in A.M.C.R. 2.60.006.

  
Darrel W. Hess  
Municipal Ombudsman