

LAI-ON-THE-TABLE

Submitted by: Assembly Chair LaFrance
Assembly Vice Chair Constant
Assembly Member Zaletel
Prepared by: Assembly Counsel's Office
For reading: March 21, 20223

ANCHORAGE, ALASKA
AR No. 2023-_____

A RESOLUTION OF THE ANCHORAGE ASSEMBLY AUTHORIZING THE ASSEMBLY COUNSEL'S OFFICE TO PURSUE LITIGATION RELATED TO THE PAYMENT OF CLAIMS REGARDING THE NAVIGATION CENTER CONSTRUCTION COSTS.

WHEREAS, the appropriations and contracting for the design, manufacture, and construction of an adult shelter and/or navigation center in the Municipality near Tudor and Elmore streets has involved several measures by the Anchorage Assembly and Administration, including:

- AO 2021-116(S), As Amended, in December of 2021 appropriated \$6,000,000 as a grant to the Alaska Community Foundation (ACF) for implementing several elements of the Municipality's mass care exit strategy, including \$2,800,000 "toward a design and manufacture of a structure for Adult Shelter and Navigation Center by the Municipality of Anchorage."
- AR 2022-72 in March of 2022 acknowledged receipt of a restricted contribution from ACF of \$800,000 and appropriated it to the Maintenance & Operations Department (M&O Department) "to be used for design and/or design/manufacture for an adult shelter and/or navigation center."
- The M&O Department proceeded to procure a contract using a process called Construction Manager at Risk (CMAR) or Construction Manager/General Contractor (CM/GC) and awarded RFP2022P077, executing contract C-2022001049 with Roger Hickel Contracting, Inc. on March 21, 2022 ("RHC Contract"), in an initial amount of \$50,000. The scope of services includes:
 - mitigating risks during the design phase, recommending a construction services strategy, and preparing cost estimates, and proposing a Guaranteed Maximum Price for construction costs.
 - The MOA will retain a Cost Consultant for independent review and advise. The MOA can negotiate with RHC for the contract to become a General Contractor/Construction Contract based on the GMP, or reject the GMP and procure a construction contractor, ending the RHC contract.
 - If accepted, then RHC prepares a Construction Schedule and establishes procedures for processing and expediting the work.
- On May 31, 2022 RHC and the M&O Department executed Amendment No. 1 to the RHC Contract, expanding the scope of work to General Contractor, extending the term to May 31, 2023, and appending standard specifications governing the construction work.
- AR 2022-111(S), As Amended, in May of 2022 appropriated \$4,900,000 "to

1 be used for construction of an adult shelter and/or navigation center.”

- 2 • AM 496-2022 is proposed at the September 13, 2022 regular Assembly
3 meeting by the M&O Department, requesting Assembly approval of
4 Amendment No. 2 to the RHC Contract for “the addition of General
5 Contractor (GC) construction services at an amount not to exceed (NTE)
6 \$4,900,000 and a contract extension through June 30, 2023.”
- 7 • The Assembly postponed consideration of AM 496-2022 to its October 25,
8 2022 regular meeting, and it fails to pass by a vote of 3 ayes to 9 nays.;

9 and

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11 **WHEREAS**, It was discovered that RHC had proceeded to provide construction
12 services and begun excavation, fill, grading, forms and concrete for footings at the
13 site, months prior to AM 496-2022 being before the Assembly for consideration at
14 its September 13 meeting, which would have covered the scope of some work
15 already provided; and

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17 **WHEREAS**, Pre-construction and construction work at the Navigation Center site
18 by Tudor and Elmore ceased after September 13 and was not resumed; and

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20 **WHEREAS**, Anchorage Municipal Code sections 7.15.040D. and 7.15.080D. both
21 provide that “[n]o contractor may provide supplies, services, professional services,
22 or construction provided to the municipality before the applicable requirements of
23 this section are first satisfied.” and

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25 **WHEREAS**, AMC section 7.15.040B. requires Assembly approval of a
26 memorandum with the essential terms of contracts for professional services or
27 construction of more than \$500,000 when awarded through competitive procedures,
28 and AMC section 7.15.080 requires Assembly approval of an amendment to a
29 contract with an original award value of \$50,000 or less that causes the total amount
30 to exceed \$50,000 or 125 percent of the original contract award; and

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32 **WHEREAS**, The amount requested by AM 496-2022 for increasing the total amount
33 of the CM/GC contract with RHC would have caused it to exceed nearly 10,000
34 percent of the original contract award; and

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36 **WHEREAS**, Both of the aforementioned provisions require the Assembly approval
37 before execution of the contract or the amendment; and

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39 **WHEREAS**, The work that Roger Hickel Contracting, Inc. performed for the
40 Municipality above the original \$50,000 contract amount required Assembly
41 approval prior to execution of an amendment increasing the amount and authorizing
42 performance of the construction work, but no approval was requested by the
43 Administration and no approval was granted by the Assembly, a fact that was
44 publicly acknowledged and reported in local media;¹ and

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¹ See, e.g., Emily Goodykoontz, Bronson Administration Approved \$4.9 Million For Construction For East Anchorage Homeless Shelter Without Required Assembly Approval, ANCHORAGE DAILY NEWS (Oct. 14, 2022), available at: <https://www.adn.com/alaska-news/anchorage/2022/10/13/bronson-administration-green-lit-49-million-in-construction-for-east-anchorage-homeless-shelter-without-assembly-approval/>

1 **WHEREAS**, The Assembly passed and approved AO 2022-105 on December 20,
2 2022; it was vetoed by the Mayor and the veto overridden on January 10, 2023; and
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4 **WHEREAS**, AO 2022-105 enacted a new code section AMC 7.15.043 that required:
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6 Where supplies, services, professional services or construction are provided
7 to or performed for the municipality without an assembly approval required
8 by section 7.15.040, no payment for the supplies, services, professional
9 services or construction, including a payment made pursuant to or in
10 connection with a settlement of claims related to a contractor's provision of
11 the supplies, or performance of services, professional services or
12 construction, may be made by the municipality, unless the payment is
13 approved by majority vote of the assembly.;

14 and
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16 **WHEREAS**, by memorandum dated February 24, 2023, the Acting Municipal
17 Manager informed the Assembly Members of claims made against the Municipality
18 by RHC asserting its entitlement to payment for work it performed on the Navigation
19 Center prior to the time the project was terminated, that such claims had been
20 reviewed and vetted by a third party, The Boutet Company, and that the
21 Administration intends to pay \$2,455,351.93 to RHC on March 24, 2023; and
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23 **WHEREAS**, the same day, February 24, 2023, the Assembly Leadership sent a
24 response letter asserting that (1) payment of the RHC claims without Assembly
25 approval would violate newly enacted AMC section 7.15.043, and (2) there were no
26 appropriated funds available for such a payment; and
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28 **WHEREAS**, in a response letter dated March 7, 2023, the Acting Municipal Manager
29 stated the Administration's disagreement with both assertions above, and as to the
30 first one reiterated the Mayor's veto message for AO 2022-105 taking a position that
31 it was unconstitutional and violative of the separation of powers doctrine, because
32 "whether or how to proceed with claims, and ... to dispose of claims, is an executive
33 branch power that is not subject to the control of other branches of government.";
34 and
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36 **WHEREAS**, there is an unresolved difference in perspective of the law on this
37 matter among attorneys for both the Administration and the Assembly; and
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39 **WHEREAS**, informal discussions between representatives of the Assembly and the
40 Administration to resolve the issue in an agreeable manner have not been fruitful so
41 far; and
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43 **WHEREAS**, after repeated queries in open session at the Assembly's March 21,
44 2023 regular meeting as to whether the Administration intends to pay RHC its claims
45 as described above on March 24, 2023, without Assembly approval and without any
46 additional appropriation request, the Mayor refused to provide a clear answer,
47 responding emphatically that the Administration "will follow the law" without
48 commitment to obtaining Assembly approval or appropriation;
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50 **NOW, THEREFORE, BE IT RESOLVED THAT THE ANCHORAGE ASSEMBLY:**

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Section 1. Authorizes the Assembly Counsel’s Office to initiate litigation, on behalf and in the name of the Anchorage Municipal Assembly, appropriate to prevent an unlawful disbursement of funds and compel the Mayor and his Administration to comply with the requirements of AMC section 7.15.043, as duly enacted by passage and approval of AO 2022-105, after override of a mayoral veto. Assembly Counsel’s Office may, for the Anchorage Municipal Assembly, proceed with legal action to include seeking injunctive relief, or any other relief from the courts as Counsel deems most advisable and after conferring with the Assembly Chair and Vice Chair.

Section 2. This resolution shall be effective immediately upon passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 2023.

Chair of the Assembly

ATTEST:

Municipal Clerk