

Municipal Clerk's Office

Approved

Date: **March 22, 2023**

Submitted by: Assembly Chair LaFrance
Vice Chair Constant, and
Assembly Member Zaletel

Prepared by: Assembly Counsel's Office
For reading: March 22, 2023

**ANCHORAGE, ALASKA
AR No. 2023-101**

1 **A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY**
2 **REAPPROPRIATING NOT TO EXCEED FOUR MILLION NINE HUNDRED**
3 **THOUSAND DOLLARS (\$4,900,000) PREVIOUSLY APPROPRIATED BY**
4 **AR 2022-111(S), AS AMENDED, "FOR CONSTRUCTION OF AN ADULT**
5 **SHELTER AND/OR NAVIGATION CENTER," TO THE EXTENT ANY SUCH**
6 **AMOUNTS REMAIN AVAILABLE AND THE APPROPRIATION HAS NOT**
7 **LAPSED; TO CLARIFY THAT NO FUNDS ARE AVAILABLE TO MAKE**
8 **PAYMENTS IN EXCESS OF \$50,000 THAT ARISE OUT OF, OR IN**
9 **CONNECTION WITH RFP2022P077, CONTRACT C-2022001049, AM 496-2022**
10 **AND/OR THAT RELATE TO THE PROVISION OF CONSTRUCTION**
11 **MANAGER/GENERAL CONTRACTOR SERVICES FOR A NAVIGATION**
12 **CENTER TO BE LOCATED AT 4501 ELMORE ROAD; AND TO CLARIFY THAT**
13 **THE ASSEMBLY HAS NOT APPROVED BY MAJORITY VOTE PURSUANT TO**
14 **AMC SECTION 7.15.043 TO AUTHORIZE ANY SUCH PAYMENTS.**

15
16 **WHEREAS**, in AR 2022-111(S), As Amended, the Anchorage Assembly
17 appropriated "the sum of Not to Exceed Four Million Nine Hundred Thousand
18 Dollars (\$4,900,000) . . . from previously appropriated funds on AO 2020-99, As
19 Amended for property acquisition, within the Areawide General Capital
20 Improvement Projects Fund (401800), Maintenance & Operations Department to be
21 used for construction of an adult shelter and/or navigation center";

22
23 **WHEREAS**, the Administration issued RFP2022P077 to procure construction
24 manager/general contractor services for a navigation center to be located at 4501
25 Elmore Road, and later awarded Contract C-2022001049 for those services to
26 Roger Hickel Contracting, Inc.;

27
28 **WHEREAS**, the Administration has acknowledged that work that Roger Hickel
29 Contracting, Inc. performed for the Municipality above the original \$50,000 contract
30 amount required Assembly approval under AMC sections 7.15.040 and 7.15.080,
31 but no approval was requested by the Administration, and no approval was granted
32 by the Assembly;

33
34 **WHEREAS**, the Administration has already paid Roger Hickel Contracting, Inc.
35 \$2.025 million directly and indirectly, and is now proposing to pay Roger Hickel
36 Contracting, Inc. an additional \$2,455,351.93;

37
38 **WHEREAS**, the Administration has asserted that it may pay Roger Hickel
39 Contracting, Inc. the additional \$2.455 million using remaining funds appropriated
40 by AR 2022-111(S), As Amended;

41
42 **WHEREAS**, Assembly Leadership has taken the position that no funds are available

1 to the Administration from which to pay Roger Hickel Contracting, Inc. an additional
2 \$2.455 million because (1) funds appropriated by AR 2022-111(S) lapsed as a
3 consequence of the Assembly's rejection of AM 496-2022 on October 25, 2022,
4 which effectively abandoned the navigation center project anticipated by AR 2022-
5 111(S), and (2) section 13.07 of the Anchorage Municipal Charter, *Lapse of*
6 *Appropriations*, which provides that "At the close of the fiscal year, an
7 unencumbered appropriation shall lapse into the fund from which appropriated. An
8 appropriation for capital improvement, or in connection with requirements of federal
9 and state grants, shall not lapse until the purpose of the appropriation has been
10 accomplished or abandoned";

11
12 **WHEREAS**, the Assembly has already made clear with express language that all
13 appropriations made in the 2023 operating and capital improvement budgets "do not
14 include an appropriation for the payment of any settlement of claims related in any
15 amount that in the aggregate exceed \$50,000 that arise out of, or in connection with
16 RFP2022P077, Contract C-2022001049, AM 496-2022 and/or that relate to the
17 provision of construction manager/general contractor services for a navigation
18 center to be located at 4501 Elmore Road," such that "The Mayor and Administration
19 may not use any funds appropriated [in the 2023 budgets] on such settlement(s)";
20

21 **WHEREAS**, no Administration should be allowed, without Assembly authorization,
22 to pay a contractor \$4.4 million for work that could not be lawfully performed without
23 Assembly authorization;
24

25 **WHEREAS**, Roger Hickel Contracting, Inc. knew or should have known that it was
26 proceeding at risk without the required assembly approval of the general contractor
27 services amendment as proposed in AM 496-2022, particularly given that, in 2013,
28 it performed, without required Assembly approval, nearly \$5 million of work on Plant
29 2A for Municipal Light and Power, which led to significant public attention and
30 Assembly debate; and
31

32 **WHEREAS**, the Assembly *may* authorize the Administration to make additional
33 payments to Roger Hickel Contracting, Inc., and it invites the Administration to
34 convene a worksession on the merits of making any such additional payments; now,
35 therefore
36

37 **THE ANCHORAGE ASSEMBLY RESOLVES:**

38
39 **Section 1.** Any unexpired appropriations made by AR 2022-111(S), As Amended,
40 are hereby reappropriated to not include an appropriation for a payment in any
41 amount that in the aggregate exceeds \$50,000 arising out of, or in connection with
42 RFP2022P077, Contract C-2022001049, AM 496-2022 and/or that relates to the
43 provision of construction manager/general contractor services for a navigation
44 center to be located at 4501 Elmore Road. The Mayor and Administration may not
45 use any funds previously appropriated by AR 2022-111(S) to make such payments
46 without additional Assembly authorization.
47

48 **Section 2.** The Assembly finds and declares it has not, pursuant to AMC section
49 7.15.043, approved any payment to Roger Hickel Contracting, Inc. for supplies,
50 services, professional services or construction that Roger Hickel Contracting, Inc.
51 provided to or performed for the Municipality without required Assembly approval.

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Section 3. That the Mayor and Administration are invited to convene a worksession to discuss the merits of making any additional payments to Roger Hickel Contracting, Inc.

Section 4. This resolution shall be effective immediately upon passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this 22nd day of March, 2023.

ATTEST:

Suzanne LaFrance

Chair

Jennifer Veneklasen

Municipal Clerk



MUNICIPALITY OF ANCHORAGE

Assembly Memorandum

No. AM 225-2023

Meeting Date: March 22, 2023

1 **From:** ASSEMBLY CHAIR LAFRANCE, VICE CHAIR CONSTANT, AND
2 MEMBER ZALETEL
3

4 **Subject:** A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY
5 REAPPROPRIATING NOT TO EXCEED FOUR MILLION NINE
6 HUNDRED THOUSAND DOLLARS (\$4,900,000) PREVIOUSLY
7 APPROPRIATED BY AR 2022-111(S), AS AMENDED, "FOR
8 CONSTRUCTION OF AN ADULT SHELTER AND/OR
9 NAVIGATION CENTER," TO THE EXTENT ANY SUCH AMOUNTS
10 REMAIN AVAILABLE AND THE APPROPRIATION HAS NOT
11 LAPSED; TO CLARIFY THAT NO FUNDS ARE AVAILABLE TO
12 MAKE PAYMENTS IN EXCESS OF \$50,000 THAT ARISE OUT OF,
13 OR IN CONNECTION WITH RFP2022P077, CONTRACT C-
14 2022001049, AM 496-2022 AND/OR THAT RELATE TO THE
15 PROVISION OF CONSTRUCTION MANAGER/GENERAL
16 CONTRACTOR SERVICES FOR A NAVIGATION CENTER TO BE
17 LOCATED AT 4501 ELMORE ROAD; AND TO CLARIFY THAT
18 THE ASSEMBLY HAS NOT APPROVED BY MAJORITY VOTE
19 PURSUANT TO AMC SECTION 7.15.043 TO AUTHORIZE ANY
20 SUCH PAYMENTS.
21

22 The attached resolution is intended to clarify that no funds are available for
23 the Administration to pay additional amounts to Roger Hickel Contracting, Inc. for
24 work that Roger Hickel Contracting performed without required Assembly
25 authorization.
26

27 By a Memorandum of February 24, 2023,¹ Acting Municipal Manager Kent
28 Kohlhasse advised the Assembly that the Administration intends to pay Roger
29 Hickel Contracting, Inc, an additional \$2.455 million (on top of \$2.025 million
30 already paid, directly and indirectly) to settle claims related to the terminated 4501
31 Elmore Road Navigation Center project.
32

33 By letter of February 24, 2023, Assembly Leadership noted that the
34 Administration cannot make additional payments to Roger Hickel Contracting for
35 unauthorized Navigation Center work, without additional authorization from and
36 action by the Assembly, and without an appropriation for that purpose.²
37

38 By letter of March 7, 2023, Acting Municipal Manager Kohlhasse informed
39 Assembly Leadership that the Administration believes it may pay Roger Hickel

1 See Attachment 1.

2 See Attachment 2.

1 Contracting the additional \$2.455 million without further Assembly authorization,
2 using funds appropriated by AR 2022-111(S), As Amended.³
3

4 Assembly Leadership does not agree with the Administration's position, and
5 through the attached resolution, aims to remove any doubts.
6

7 In AR 2022-111(S), as amended, the Anchorage Assembly appropriated
8 "the sum of Not to Exceed Four Million Nine Hundred Thousand Dollars
9 (\$4,900,000) . . . from previously appropriated funds on AO 2020-99, As Amended
10 for property acquisition, within the Areawide General Capital Improvement Projects
11 Fund (401800), Maintenance & Operations Department to be used for construction
12 of an adult shelter and/or navigation center."
13

14 Thereafter, the Administration issued RFP2022P077 to procure
15 construction manager/general contractor services for a navigation center to be
16 located at 4501 Elmore Road, and later awarded Contract C-2022001049 for those
17 services to Roger Hickel Contracting, Inc.
18

19 The Administration has acknowledged that work that Roger Hickel
20 Contracting, Inc. performed for the Municipality above the original \$50,000 contract
21 amount required Assembly approval under AMC sections 7.15.040 and 7.15.080,
22 but no approval was requested by the Administration, and no approval was granted
23 by the Assembly.
24

25 Assembly leadership has taken the position that no funds are available to
26 the Administration from which to pay Roger Hickel Contracting, Inc. an additional
27 \$2.455 million because funds appropriated by AR 2022-111(S) lapsed as a
28 consequence of the Assembly's rejection of AM 496-2022 on October 25, 2022,
29 which effectively abandoned the navigation center project anticipated by AR 2022-
30 111(S) and section 13.07 of the Anchorage Municipal Charter, Lapse of
31 Appropriations, which provides that "At the close of the fiscal year, an
32 unencumbered appropriation shall lapse into the fund from which appropriated. An
33 appropriation for capital improvement, or in connection with requirements of
34 federal and state grants, shall not lapse until the purpose of the appropriation has
35 been accomplished or abandoned."
36

37 Moreover, the Assembly has already made it explicitly clear that all
38 appropriations made in the 2023 operating and capital improvement budgets "do
39 not include an appropriation for the payment of any settlement of claims related in
40 any amount that in the aggregate exceed \$50,000 that arise out of, or in connection
41 with RFP2022P077, Contract C-2022001049, AM 496-2022 and/or that relate to
42 the provision of construction manager/general contractor services for a navigation
43 center to be located at 4501 Elmore Road," such that "The Mayor and
44 Administration may not use any funds appropriated [in the 2023 budgets] on such
45 settlement(s)."
46

47 The attached resolution would reappropriate any remaining and unexpired
48 funds appropriated by AR 2022-111(S), As Amended, to include a similar
49 restriction.

3 See Attachment 3.

1
2 Importantly, Roger Hickel Contracting, Inc. knew or should have known that
3 it was proceeding at risk without the required assembly approval of the general
4 contractor services amendment as proposed in AM 496-2022, particularly given
5 that, in 2013, it performed, without required Assembly approval, nearly \$5 million
6 of work on Plant 2A for Municipal Light and Power, which led to significant public
7 attention⁴ and Assembly debate.⁵

8
9 That said, the Assembly certainly *may* authorize the Administration to make
10 additional payments to Roger Hickel Contracting, Inc. We have invited the
11 Administration to convene a worksession on the merits of making any such
12 additional payments.

13
14 But fundamentally, no Administration should be allowed, without Assembly
15 authorization, to pay a contractor \$4.4 million for work that could not be lawfully
16 performed without Assembly authorization.

17
18 **We request your support of this resolution.**

19
20 Prepared by: Assembly Counsel's Office

21
22 Respectfully submitted: Suzanne LaFrance, Assembly Chair
23 District 6, South Anchorage, Girdwood & Turnagain
24 Arm

25
26 Christopher Constant, Assembly Vice Chair
27 District 1, North Anchorage

28
29 Meg Zaletel, Assembly Member
30 District 4, Midtown Anchorage

4 See Nathaniel Herz, "Assembly votes to postpone disputed payment,"
ANCHORAGE DAILY NEWS (Nov. 6, 2013), Attachment 4.


5 See AM 621-2013, Attachment 5.



MUNICIPALITY OF ANCHORAGE
MAYOR DAVE BRONSON

OFFICE OF THE MUNICIPAL MANAGER

M E M O R A N D U M

Date: February 24, 2023
To: Assembly Members
From: Kent Kohlhase, P.E., Acting Municipal Manager 

Subject: Claim of Roger Hickel Contracting, Inc. re: Navigation Center Construction

As we all anticipated, Roger Hickel Contracting, Inc. has made a claim against the Municipality asserting an entitlement to payment for work it performed in construction of the Navigation Center prior to the time the project was terminated. The cost basis of that claim was carefully reviewed by The Boutet Company on behalf of the Administration, and largely found to consist of valid charges. Through discussions with the claimant, a compromise has been reached in which the claimant will forego those charges that were not substantiated by Boutet, and we believe that it is in the best interest of the Municipality to settle the claim at this time and avoid the expense of litigation. Accordingly, I am writing to provide you advance notice that the Administration intends to settle that claim with finality, and that we intend to do so on March 24, 2023 by paying \$2,455,351.93 to Roger Hickel Contracting, Inc.

On May 10, 2022, the Assembly passed AR 2022-111 (S) as amended. That resolution appropriated \$4,900,000 "to be used for construction of an adult shelter and/or navigation center". This existing appropriation is more than sufficient to satisfy the claim at hand. Since the claim is for construction work falling squarely within the appropriation's designation that it be used to pay for "construction of an adult shelter and/or navigation center", it is the Administration's intent to fund the settlement with this appropriation.

We are aware that the appropriation was conditional upon the Administration making "a firm written commitment to make a good faith effort" to operate the former Golden Lion Hotel "as a substance misuse treatment center". The Mayor satisfied that condition on June 1, 2022, when he issued a statement acknowledging that direction was given to "the facilitation group guiding the mass care exit to recommend the best option to providing substance misuse treatment centers" and promising to consider the former Golden Lion Hotel for this purpose.

At your request, I will provide you with a copy of both Roger Hickel Contracting's documentation in support of its claim and the documentation provided by The Boutet Company.



Municipality of Anchorage

P.O. Box 196650 • Anchorage, Alaska 99519-6650 • Telephone: (907) 343-4311 • Fax: (907) 343-4313 • <http://www.muni.org/assembly>

Anchorage Assembly Leadership

February 24, 2023

Acting Municipal Manager Kent Kohlhase
632 W. 6th Ave., Suite 850
Anchorage, AK 99501

Re: Need for Assembly Approval per AMC 7.15.043 and Additional Appropriation Prior to Any Payment to Settle Claim of Roger Hickel Contracting, Inc. re: Navigation Center Construction

Dear Mr. Kohlhase:

Assembly Leadership received your Memorandum of Feb. 24, 2023 advising the Assembly of the Administration's intent to settle claims made by Roger Hickel Contracting, Inc. related to the Navigation Center project. You indicate that the Administration intends to settle the claims by paying Roger Hickel Contracting, Inc. \$2.455 million on March 24, 2023.

The Assembly appreciates receiving advance notice of the Administration's intent.

By this letter, Assembly leadership reminds the Administration of recently adopted AO 2022-105 (attached) and the lapse for abandonment provisions of Charter § 13.07. Because of this municipal law, no payment to Roger Hickel Contracting can be made to settle Navigation Center claims without additional Assembly action.

To be clear: making the proposed payment without additional Assembly action would be illegal.

This is so for two reasons.

First, AMC 7.15.043, adopted by AO 2022-105, requires the Assembly to authorize payments for "for supplies, services, professional services or construction . . . provided to or performed for the municipality without an assembly approval required by section 7.15.040"; section 7.15.040, as you know, has long-required Assembly approval of larger-dollar contracts and of amendments making substantial dollar amount amendments¹:

¹ See AMC 7.15.040 *Assembly approval of contracts* (first adopted in 1979, last amended in 2019):

- A. **No contract for supplies, services, professional services or construction whereby the municipality is obligated to pay more than \$500,000.00 pursuant to a contract awarded through competitive procedures**, which are described in

AMC 7.15.043 Assembly Approval of Payment For Supplies, Services, Professional Services Or Construction Provided or Performed Without An Assembly Approval Required by Section 7.15.040.

Where supplies, services, professional services or construction are provided to or performed for the municipality without an assembly approval required by section 7.15.040, no payment for the supplies, services, professional services or construction, including a payment made pursuant to or in connection with a settlement of claims related to a contractor's provision of the supplies, or performance of services, professional services or construction, may be made by the municipality, unless the payment is approved by majority vote of the assembly.

(emphasis added).

As you know, the work Roger Hickel Contracting, Inc. performed for the Municipality above the original \$50,000 contract amount required Assembly approval under AMC 7.15.040 and 7.15.080, but no approval was requested by the Administration, and no approval was granted by the Assembly. The Administration has publicly acknowledged that fact.²

Second, it is also the case that no funds are presently available to the Administration to make any payment to Roger Hickel, Inc. The general-government operating and capital budgets adopted by the Anchorage Assembly for 2023 each included an amendment in the following form:

sections 7.20.020 through 7.20.040 (bids) and 7.20.060 (proposals), or more than \$30,000.00 including any amendment pursuant to contracts awarded under section 7.20.080A.5, **or more than \$50,000.00 pursuant to contracts awarded through other authorized procedures, may be executed unless the assembly has approved a memorandum setting forth the essential terms of the contract.** .

² 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/> ("During a work session with the Assembly last week, Director of Public Works Lance Wilber conceded the error. 'I think the error on our part was that in a traditional construction contracting process, we should have gone to the Assembly initially and asked to amend the contract,' Wilber said. 'We did not do that,' he said.").

The appropriations made by this ordinance do not include an appropriation for the payment of any settlement of claims related in any amount that in the aggregate exceed \$50,000 that arise out of, or in connection with RFP2022P077, Contract C-2022001049, AM 2022-496 and/or that relate to the provision of construction manager/general contractor services for a navigation center to be located at 4501 Elmore Road. The Mayor and Administration may not use any funds appropriated by this ordinance on such settlement(s).³

Your letter indicates a belief that funds appropriated by AR 2022-111(S), As Amended, “to be used for construction of an adult shelter and/or navigation center” could be used to pay the proposed settlement. That is not correct. By operation of Section 13.07 of the Charter, the Assembly appropriation made in 2022 lapsed when the overall capital improvement project was effectively “abandoned” by operation of the Assembly’s vote to defeat AM 2022-496⁴ on October 25, 2022:

ANCHORAGE MUNICIPAL CHARTER Section 13.07. *Lapse of appropriations.*

At the close of the fiscal year, an unencumbered appropriation shall lapse into the fund from which appropriated. An appropriation for capital improvement, or in connection with requirements of federal and state grants, shall not lapse until the purpose of the appropriation has been accomplished or abandoned.

All of this is not to say that the Assembly *necessarily* objects to the proposed settlement. As the Vice Chair stated in the meeting of November 22, 2022 in consideration of these amendments:

[T]he assembly can always reappropriate. [T]his prohibition doesn't have to be the end of the story – it's not the end of the story. . . I believe and I hope – and I hope that everybody hopes – that we still find a workable resolution to this issue.⁵

We therefore request:

³ See General Government Operation Budget Amendment 12; General Government Capital Budget Amendment 11, attached. The general operating budget amendment was introduced at <https://youtu.be/X0xmDpY7pnE?t=12829> and passed at <https://youtu.be/X0xmDpY7pnE?t=13322> . The capital budget amendment was introduced and passed at <https://youtu.be/X0xmDpY7pnE?t=15236>

⁴ See <https://www.muni.org/Lists/AssemblyListDocuments/DispForm.aspx?ID=766260&cmd=overridecb>

⁵ Meeting of Nov. 22, 2022, available at: <https://youtu.be/X0xmDpY7pnE?t=13285>

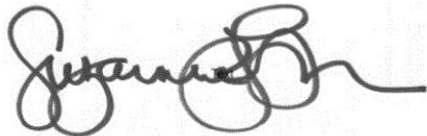
- (1) that the Administration prepare and submit to the Assembly resolutions for the following for the body to consider:
 - (a) to secure the Assembly approval required by AMC 7.15.043, and
 - (b) to appropriate and make available to the Administration funds to pay the proposed settlement; and
- (2) that after the above are submitted the Administration participate in a worksession to be held prior to the Assembly vote on the two requested items, and present to the Assembly its view on why the proposed settlement is fair, justified, and in the best interest of the Municipality and its residents.

We stand ready to consider the Mayor's proposed resolution.

Last, you conclude your memorandum by offering to provide the Assembly with "a copy of Roger Hickel Contracting's documentation in support of its claim" and "the documentation provided by The Boutet Company." We appreciate the offer. Please forward the documentation to each Assembly member, or otherwise advise members on how it can be accessed.

If you have any questions related to this response, we would be happy to discuss.

Sincerely,



Suzanne LaFrance, Assembly Chair



Christopher Constant, Assembly Vice Chair

Cc: Mayor Dave Bronson
Anne Helzer- Acting Municipal Attorney
Grant Yutrzenka - Acting CFO
Dean T. Gates, Assembly Counsel

Attachments

AO 2022-105
General Government Operation Budget Amendment 12
General Government Capital Budget Amendment 11

**ANCHORAGE, ALASKA
AO No. 2022-105**

AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY REQUIRING ASSEMBLY APPROVAL OF PAYMENTS, PURSUANT TO A LEGAL SETTLEMENT OR OTHERWISE, FOR SUPPLIES, SERVICES, PROFESSIONAL SERVICES OR CONSTRUCTION THAT WERE NOT PROVIDED OR PERFORMED IN ACCORDANCE WITH ANCHORAGE MUNICIPAL CODE 7.15.040 ASSEMBLY APPROVAL OF CONTRACTS.

WHEREAS, in accordance with common municipal practice, long-standing local law codified as Anchorage Municipal Code section 7.15.040 *Assembly Approval of Contracts* provides that “No contract for supplies, services, professional services or construction whereby the municipality is obligated to pay more than \$500,000.00 pursuant to a contract awarded through competitive procedures, which are described in sections 7.20.020 through 7.20.040 (bids) and 7.20.060 (proposals), or more than \$30,000.00 including any amendment pursuant to contracts awarded under section 7.20.080A.5, or more than \$50,000.00 pursuant to contracts awarded through other authorized procedures, may be executed unless the assembly has approved a memorandum setting forth the essential terms of the contract”;

WHEREAS, Anchorage Municipal Code section 7.15.020 *Contracts Enforceable Against Municipality* provides that “No contract for supplies, services, professional services or construction, or any amendment thereto, may be enforced against the municipality unless its terms have been approved in accordance with this chapter [7.15] and unless the contract or amendment thereto has been set forth in a writing executed in accordance with this chapter”;

WHEREAS, any contract to that purports to authorize payment in excess of the amounts listed in AMC 7.15.040 cannot be lawfully executed without prior assembly approval of the essential terms of the amendment, and so is void;

WHEREAS, as noted in Attachment A, a general principal of municipal law is that “if a contract is within the corporate power of a municipality but the contract is entered into without observing mandatory legal requirements specifically regulating the mode by which it is to be exercised, there can be no recovery under the contract” and “the mere fact that the municipality has received benefits does not make the municipality liable, either on the theory of ratification, estoppel, or implied contract”;

WHEREAS, the treatise notes that the rationale behind municipalities and courts typically refusing to enforce contracts that were entered into illegally, or to allow a contractors to recover for work performed pursuant to an illegal contract is that “if the municipality is allowed to disregard the formalities and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered, either on the ground of ratification, estoppel, or implied contract, then it follows that the statute or charter provision can always be evaded”

(emphasis added);

WHEREAS, if the Administration agrees to settle contractor claims without Assembly approval, and thereby pays a contractor for work performed in violation of AMC 7.15.040, the Administration will have effectively “evaded” AMC 7.15.040 undermined the Assembly’s role in approving municipal contracts, and upset Anchorage’s long-standing system of municipal checks and balances, precipitating significant separation-of-powers concerns;

WHEREAS, Assembly consent should be obtained before the Municipality makes payments for work performed in violation of AMC 7.15.040;

WHEREAS, this ordinance will not have significant economic effects; now, therefore:

THE ANCHORAGE MUNICIPAL ASSEMBLY ORDAINS:

Section 1. Anchorage Municipal Code chapter 7.15 is hereby amended by adding a new section 7.15.043, to read as follows:

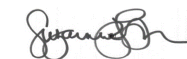
7.15.043 Assembly Approval of Payment For Supplies, Services, Professional Services Or Construction Provided or Performed Without An Assembly Approval Required by Section 7.15.040.

Where supplies, services, professional services or construction are provided to or performed for the municipality without an assembly approval required by section 7.15.040, no payment for the supplies, services, professional services or construction, including a payment made pursuant to or in connection with a settlement of claims related to a contractor’s provision of the supplies, or performance of services, professional services or construction, may be made by the municipality, unless the payment is approved by majority vote of the assembly.


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

PASSED AND APPROVED by the Anchorage Assembly this 20th day December, 2022.

ATTEST:



Chair



Municipal Clerk



MUNICIPALITY OF ANCHORAGE

ASSEMBLY MEMORANDUM

No. AM 669-2022

Meeting Date: November 22, 2022

From: Assembly Vice Chair Constant

Subject: AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY REQUIRING ASSEMBLY APPROVAL OF PAYMENTS, PURSUANT TO A LEGAL SETTLEMENT OR OTHERWISE, FOR SUPPLIES, SERVICES, PROFESSIONAL SERVICES OR CONSTRUCTION THAT WERE NOT PROVIDED OR PERFORMED IN ACCORDANCE WITH ANCHORAGE MUNICIPAL CODE 7.15.040 ASSEMBLY APPROVAL OF CONTRACTS.

The ordinance submitted with this memorandum would enact a new provision of municipal code to ensure that AMC section 7.15.040 *Assembly Approval of Contracts* cannot be effectively evaded.

In accordance with common municipal practice, AMC 7.15.040 provides that “No contract for supplies, services, professional services or construction whereby the municipality is obligated to pay more than \$500,000.00 pursuant to a contract awarded through competitive procedures, which are described in sections 7.20.020 through 7.20.040 (bids) and 7.20.060 (proposals), or more than \$30,000.00 including any amendment pursuant to contracts awarded under section 7.20.080A.5, or more than \$50,000.00 pursuant to contracts awarded through other authorized procedures, may be executed unless the assembly has approved a memorandum setting forth the essential terms of the contract.”

If the Administration can, without Assembly approval, agree to a contractor’s request, through a legal settlement or otherwise, for the contractor to be paid for work that the contractor performed (or materials that the contractor supplied) without an Assembly approval required by AMC 7.15.040, then that section becomes a dead letter: the requirement that Assembly approve certain contracts and amendments would be effectively nullified.

That result would upset Anchorage’s long-standing system of municipal checks and balances, and precipitate significant separation-of-powers concerns.

The new section of Code proposed by the ordinance submitted with this memorandum aims to plug the gap. Already, Anchorage Municipal Code provides that contracts made in violation of AMC 7.15.040 (and any other provision of AMC 7.15) are unenforceable.¹ The proposed new AMC 7.15.043 would serve as a companion piece and provide that no payment for services or

¹ See AMC 7.15.020 *Contracts Enforceable Against Municipality* provides:

No contract for supplies, services, professional services or construction, or any amendment thereto, may be enforced against the municipality unless its terms have been approved in accordance with this chapter [7.15] and unless the contract or amendment thereto has been set forth in a writing executed in accordance with this chapter.

1 material supplied without an Assembly approval required by AMC 7.15.040 can be made,
2 unless the Assembly consents to the payment.

3

4 It is recommended the Assembly approve this ordinance.

5

6 Prepared by: Assembly Counsel's Office

7

8 Respectfully submitted: Christopher Constant, Assembly Vice Chair
9 District 1, North Anchorage

Attachment A

Selected Legal Citations

10 MCQUILLIN MUN. CORP. § 29:2 (3d ed.) *Essentials in considering validity.*

The general rule is that if the charter or the statute applicable requires certain steps to be taken before making a contract, and it is mandatory in terms, a contract not made in conformity with the charter or statute is invalid. Ordinarily these contracts cannot be ratified, and usually there is no implied liability for the reasonable value of the property or services of which the municipality has had the benefit. These provisions exist to protect the citizens and taxpayers of the municipality from unjust, ill-considered, or extortionate contracts or those showing favoritism. The reason these contracts are generally not enforced is that if the municipality is allowed to disregard the formalities and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered, either on the ground of ratification, estoppel, or implied contract, then it follows that the statute or charter provision can always be evaded. Cases holding the contrary are usually based on the idea that it is unjust for a municipality to receive and accept the benefits of a contract and then defend an action to recover the contract price or the reasonable value, on the ground that the contract was not entered into as provided by statute or the charter. However, it should be remembered that the other contracting party is charged with notice of the provisions of the statutes or charter in regard to contracting. Additionally, the welfare and protection of the taxpayers and residents of the municipality are of more importance than the dispensation of justice to a private party in a particular case. [I]t also has been held that a plaintiff may not recover in quantum meruit against a municipality under a quasi-contract or unjust enrichment claim for work performed where there is a contract governing the work which is illegal and unenforceable.

Id. at § 29:29.50. *Mode of executing, form, and contents—Irregularities; effect of performance*

The general rule is that if a contract is within the corporate power of a municipality but the contract is entered into without observing mandatory legal requirements specifically regulating the mode by which it is to be exercised, there can be no recovery under the contract. If a statute or charter says that certain contracts must be let to the lowest bidder, or that they must be made by ordinance, or that they must be in writing, or the like, these requirements are intended to protect the taxpayers and inhabitants, and these provisions are mandatory. If the contract is entered into or executed in a different manner, the mere fact that the municipality has received benefits does not make the municipality liable, either on the theory of ratification, estoppel, or implied contract. The prevailing rule undoubtedly is that if the powers of a municipality or its agents are subjected by statute or charter to restrictions as to the form and method of contracting which limit the power itself, the corporation cannot be held liable by either an express or an implied contract in defiance of such restrictions. The theory on which these cases are decided is that if any substantial or practical results are to be achieved by the statutory or charter

Attachment A

restrictions upon the powers of municipal officers or boards to incur liabilities, no recovery on an implied contract can be allowed, even though there may be apparent injustice in some cases in adhering strictly to statutes or charter provisions. The purpose behind the rule is to protect the public. It is better that an individual should suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combination or collusion, could be detrimental or injurious to the public. When a municipality goes beyond the law, the persons who deal with it do so at their own risk.

As examples of invalid contracts upon which no recovery has been allowed for the benefits actually received may be the following: contracts not based on public bidding; contracts not in writing; contracts not authorized by ordinance or resolution; contracts not authorized by yea and nay vote of the council; contracts upon which there was no vote of the council, where such vote is necessary; and expenditures for supplies where the necessity therefor is not certified to by the head of the appropriate department as required by charter or statute.

Id. at § 29:4 *Notice imputed to one contracting with municipality* (“The doctrine of apparent authority is inapplicable in the context of a municipal contract. . . . It is better that the innocent contracting party suffer from the municipality's mistakes than to adopt rules which, through improper combination or collusion, could be detrimental or injurious to the public. . . . A plaintiff suing to establish a contract with a city has the burden to both plead and prove that the minutes show the city council's act in authorizing or ratifying the contract.”)

Id. at § 29:7 *Power to make contracts* (“A purported municipal contract may be void and absolutely ineffective where the city took no action at all and the *ultra vires* act was that of one or more city officials who acted completely beyond their power to bind the city. Thus, in the commonplace situation where a charter or other governing law requires a municipality to approve all or certain contracts through majority vote of the city council, the governing body must act at a legal meeting and as a board. . . .”)

Id. at § 29:10. *Power to make contracts—Contracting with governments or agencies*

The party relying upon the agent's authority to bind his principal to an agreement bears the burden of proving that the agent's act was authorized. A contracting official cannot obligate the governmental entity to a contract in excess of his or her actual authority. A government agent cannot validate a contract merely by averring that she is authorized to enter it, if no such authority exists; the rule applies with equal force even if the agent herself may have been unaware of the limitations upon her authority. Furthermore, one who contracts with a government agent is constructively notified of the limits of that agent's authority, and any reliance on contrary representations cannot be reasonable.

Id. at § 29:116. [*Implied Contracts*] *In general.* (“A private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum

Attachment A

meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations. . . . A municipal corporation cannot be held liable under a contract implied in fact where there has been a failure to comply with a statute or ordinance prescribing the method by which an officer or agent can bind such corporation by contract”)

Accord id. at 29:22. *Who may act in behalf of municipality—Contract made by wrong officer or board*

Cf. City of Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 743 S.E.2d 381 (2013) (Company that provided services to city for its wastewater treatment plant was statutorily required to take notice of mayor's powers and, thus, could not recover under equitable doctrine such as quantum meruit or estoppel in action against city for money allegedly owed under contract that was ultra vires and void because it was signed by mayor, who had no unilateral authority under city Charter to approve contracts that would bind the city absent council approval):

[T]he problem with W & C's June Proposal is not that the City of Baldwin lacked the legal authority to enter such a contract; the City had that power. Neither is the concern a mere procedural irregularity; we do not hold that the June Proposal was ultra vires because it was not reviewed by the city attorney or because the Mayor failed to date the proposal at the time he signed it. The fundamental defect of the June Proposal is that the City never approved it. Instead, the proposal was discussed with and signed by *the Mayor*, who had no unilateral authority to approve contracts that would bind the City of Baldwin, because the City Charter plainly says that “[n]o contract with the city shall be binding on the city unless the contract ... is approved by the city council.” It is undisputed that the City Council never approved the June Proposal, and thus the proposal was ultra vires and void. In this situation, recovery under an equitable doctrine like quantum meruit or estoppel is not allowed, “even though the [party seeking damages] has performed its part of the bargain and might even have relied upon the contract to its detriment.”

Cf. Direct Energy Business, LLC v. City of Harvey, 2021 IL App (1st) 200629, 2021 WL 1987563 (Ill. App. Ct. 1st Dist. 2021), *appeal denied*, 451 Ill. Dec. 446, 183 N.E.3d 903 (Ill. 2021) (in the municipal law context, a contract not approved by the corporate authority is void, rather than merely voidable, and cannot be ratified by subsequent municipal action; the general rule is that when an employee of a municipal corporation purports to bind the corporation by contract without prior approval, in violation of an applicable statute, such a contract is utterly void; energy company moving for summary judgment on its breach-of-contract claim against city failed to meet its initial burden of producing facts establishing that a valid contract was formed between the parties for energy services, although city employee allegedly signed an agreement with company and city's comptroller was aware of company's invoices; there was no evidence that city council was aware of or approved of written agreement)

Attachment A

K. Hovnanian Homes of Maryland, LLC v. Mayor of Havre de Grace, 472 Md. 267, 299, 244 A.3d 1174, 1192 (2021) (“where a party is seeking to enforce a contract against a municipality in which the substance of the contract was required to be adopted by an ordinance, and no such ordinance was enacted, the contract is *ultra vires* and unenforceable.”)




Municipality of Anchorage
Mayor Dave Bronson



Office of the Mayor

MEMORANDUM

Date: December 27, 2022
To: Anchorage Assembly
From: Dave Bronson, Mayor 
Subject: Veto of Ordinance No. AO 2022-105

Pursuant to Section 2.30.100 of the Anchorage Municipal Code (AMC) and Section 5.02 of the Municipal Charter (Charter), I hereby veto AO 2022-105 passed at the Assembly's regular meeting of December 20th, 2022.

I have reviewed the ordinance, and understand the arguments and discussions advanced both in favor of and against its passage. However, as has happened too many times over the past year, this Ordinance is, at its heart, a vehicle for attempting to unconstitutionally transfer executive powers to the Assembly, and therefore must be vetoed.

The touchstone of constitutional legitimacy lies in the maxim that legislative, executive, and judicial powers must remain separate and distinct. As James Madison explained in Federalist No. 47, there is no political truth that has "greater intrinsic value".¹ This principle was universally accepted by the founding fathers of this great nation, and continues to be accepted today as canonical by scholars of democracy. The separation of powers doctrine is central to the framework of government here in Alaska,² and as the Superior Court instructed the Assembly earlier this year, it is enshrined in Anchorage's Charter.³ Complementing the separation of powers doctrine is the doctrine of checks and balances.⁴ Both doctrines address and are designed to preclude encroachments by one branch of government on the powers of another,⁵ and thereby safeguard the independence of each branch of government.⁶

I need not delve deeply into the issues that this ordinance creates with respect to the Assembly usurping the role of the courts through passage of this ordinance. Suffice to say that the separation of powers doctrine precludes courts from enacting legislation or

¹ The Federalist No. 47, at 239 (James Madison; Lawrence Goldman ed., 2008).

² Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975).

³ Bronson v. Assembly, 3AN-21-08881Civ.

⁴ Alaska Public Interest Research Group v. State, 167 P.3d 27 (Alaska 2007).

⁵ Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

⁶ State v. Recall Dunleavy, 491 P.3d 343 (Alaska 2021).

effectively redrafting defective statutes,⁷ and also provides that other governmental units “may not usurp the court’s function by pre-judging in any way the merits” of claims that may be brought before a court.⁸ To justify its preclusion of the use of executive authority by the executive branch, however, AO 2022-105 purports at the outset to adjudicate the merits of any and all claims that may arise in the future alleging that there has been a violation of AMC 7.15.020 and/or AMC 7.15.040. Specifically, the ordinance asserts that, in any situation where such a violation may be alleged, there is and can be no valid contract, no legal theory upon which a contractor may prevail, and no basis for the executive branch to ever settle such claims, regardless of the actual facts or circumstances that may be attendant to any claims that may actually arise, or any body of law that may actually apply.⁹ Necessarily, this pre-judges all such claims as may ever arise, and unconstitutionally usurps the role of the judiciary.

With respect to the separation of powers built into Anchorage’s Charter, the Charter Commission primarily sculpted a system in which legislative and executive authority are brought into balance. Integral to the separation of powers doctrine is that the allocation of assets between competing needs is a legislative function that is properly exercised through the power of appropriation,¹⁰ and no other branch of government may “intrude upon the legislature’s power to appropriate funds”.¹¹ Conversely, whether or how to proceed with claims, and whether or how to dispose of claims, is an executive branch power that is not subject to the control of other branches of government.¹² The Alaska Supreme Court has taught that the legislative power of appropriation is properly balanced against the executive power of settling a claim when the executive branch may issue a warrant against an existing legislative appropriation for the sum the executive branch finds is due to a claimant “if a sufficient appropriation exists for payment, or the department may recommend to the legislature that it appropriate a sum to cover the payment” if there is no existing appropriation.¹³

AO 2022-105 provides that in instances in which the Municipality may possibly have obtained supplies, services, or construction in violation of AMC 7.15.040, it is the Assembly who is to determine when a warrant may be issued against an existing appropriation

⁷ See Res. Dev. Council for Alaska, Inc. v. Vote Yes for Alaska’s Fair Share, 494 P.3d 541 (Alaska 2021).

⁸ Mathis v. Sauser, 942 P.2d 1117 (Alaska 1997).

⁹ Furthermore, the ordinance is conveniently silent with respect to potential disputes in which a breach of contract is only one of many claims asserted by a contractor, such that AMC 7.15.040 irrelevant to the bulk of any contemplated settlement, as well as situations that may arise in which there is a legitimate dispute as to whether a given contract was even subject to AMC 7.15.040 in the first place.

¹⁰ Alaska Action Center, Inc. v. Municipality of Anchorage, 84 P.3d 989 (Alaska 2004).

¹¹ State v. Dupere, 709 P.2d 493 (Alaska 1985).

¹² Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975).

¹³ State v. Dupere, 709 P.2d 493 (Alaska 1985). See also Anchorage Charter § 5.05, granting executive branch authority to “pay money on vouchers drawn against appropriations”.

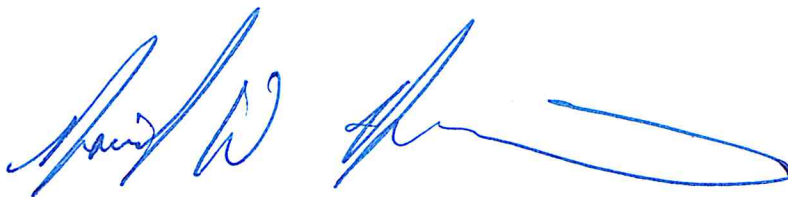


regardless of what the Executive Branch may have found is due to the contractor. As such, it impermissibly crosses the line that separates executive from legislative powers, and is unconstitutional.

If there has been a violation of AMC 7.15.040, the Municipality has remedies available to it. Of course, those remedies vary depending on the specific facts of the situation. Some of those remedies may be imposed against transgressors by the executive branch, and some by the legislative branch. What is not permissible, however, is for the legislative branch to intrude upon executive power in the absence of an express delegation of that power within the Municipal Charter,¹⁴ and the Anchorage Charter makes no delegation of executive power to the Assembly that could possibly support this ordinance.

The Assembly has the discretion to not make an appropriation against which a payment might be made to a claimant seeking compensation for supplies, services, or construction. Subject to constitutional restrictions governing Assembly enactments, the Assembly also has the power to withdraw an appropriation if that appropriation no longer meets with the approval of that body. However, whenever a valid appropriation exists, there necessarily has been an approval by a majority of the Assembly for payments made against that appropriation under Charter § 5.05, and any ordinance purporting to limit the executive branch's power to settle claims or to pay money against a valid appropriation is unconstitutional and invalid.

Benjamin Rush, one of the signers of the U.S. Declaration of Independence, is credited with originating the expression "two wrongs don't make a right". His advice is applicable here. AO 2022-105 asserts that it seeks to impose a remedy for violations of AMC 7.15.040, because such violations "upset Anchorage's long-standing system of municipal checks and balances" by evading "the Assembly's role in approving municipal contracts". However, by establishing a remedy for alleged violations as it does, it usurps the role of the judiciary in adjudicating disputes and impermissibly intrudes upon both the executive branch's power to settle claims and its power under Charter § 5.05 to "pay money on vouchers drawn against appropriations". AO 2022-105 is unconstitutional. Accordingly, I am compelled to veto the ordinance.

Two handwritten signatures in blue ink, one on the left and one on the right, both appearing to be cursive and somewhat stylized.

¹⁴ Bradner v. Hammond, 553 P.2d 1 (Alaska 1976); Bronson v. Assembly, 3AN-21-08881Civ.

November 22, 2022

Agenda Item No. 11.A.

Constant Amendment No. 12

**Proposed Amendment # 12 to AO 2022-87
2023 General Government Operating Budget**

Submitted by: Assembly Vice Chair Constant

PROPOSED AMENDMENT INCREASE DECREASE NEUTRAL (check one)

Department: not specified

Amount: Restriction on use of funds appropriated by this budget.

Description of amendment: This prohibits any appropriated funds in this budget to be used for payment of claims to Roger Hickel Contracting, Inc. or assigns for any settlement or agreement regarding the proposed Navigation Center project at 4501 Elmore Rd.

TEXT OF AMENDMENT

to add new language, [TO DELETE CURRENT CODE LANGUAGE,] and [~~to delete words proposed by the unamended AO that are not in current code~~]

AO Section 14, p. 5, beginning at line 35, amend to renumber Section 14 to 15, and insert a new Section 14 to read as follows:

Section 14. The appropriations made by this ordinance do not include an appropriation for the payment of any settlement of claims related in any amount that in the aggregate exceed \$50,000 that arise out of, or in connection with RFP2022P077, Contract C-2022001049, AM 2022-496 and/or that relate to the provision of construction manager/general contractor services for a navigation center to be located at 4501 Elmore Road. The Mayor and Administration may not use any funds appropriated by this ordinance on such settlement(s).

November 22, 2022

Agenda Item No. 11.B.

Constant Amendment No. 11

**Proposed Amendment # 11 to AO 2022-88
2023 Capital Improvement Budget**

Submitted by: Assembly Vice Chair Constant

PROPOSED AMENDMENT INCREASE DECREASE NEUTRAL (check one)

Department: not specified

Amount: Restriction on use of funds appropriated by this budget.

Description of amendment: This prohibits any appropriated funds in this budget to be used for payment of claims to Roger Hickel Contracting, Inc. or assigns for any settlement or agreement regarding the proposed Navigation Center project at 4501 Elmore Rd.

TEXT OF AMENDMENT

to add new language, [TO DELETE CURRENT CODE LANGUAGE,] and [~~to delete words proposed by the unamended AO that are not in current code~~]

AO Section 4, p. 2, beginning at line 28, amend to renumber Section 4 to 5, and insert a new Section 4 to read as follows:

Section 4. The appropriations made by this ordinance do not include an appropriation for the payment of any settlement of claims related in any amount that in the aggregate exceed \$50,000 that arise out of, or in connection with RFP2022P077, Contract C-2022001049, AM 2022-496 and/or that relate to the provision of construction manager/general contractor services for a navigation center to be located at 4501 Elmore Road. The Mayor and Administration may not use any funds appropriated by this ordinance on such settlement(s).



Municipality of Anchorage
Mayor Dave Bronson

Office of the Municipal Manager

March 7, 2023

Assembly Chair Suzanne LaFrance
Assembly Vice Chair Christopher Constant
632 W. 6th Ave
Anchorage, AK 99501

Re: Settlement of Roger Hickel Contracting, Inc. Claim
Navigation Center Construction

Dear Chair LaFrance and Vice Chair Constant:

I am writing to address some of the concerns you raised in your letter of February 24, and also to address Mr. Constant's e-mail of the same date asking whether the Mayor was aware of our intent to settle the claim with Roger Hickel Contracting, Inc. (RHC).

As to the latter, I informed the Mayor on Thursday, February 23 of our ability and desire to amicably settle the RHC claim with finality and followed that by providing the notice to the Assembly on the morning of February 24.

Also, I note that you requested that each Assembly member receive a copy of both Roger Hickel Contracting's claim documentation, and the corresponding documentation provided by The Boutet Company. Members should have received those documents on Tuesday, February 28.

In your letter, you state that effectuating the settlement would be "illegal". Respectfully, we do not agree. Further, I suggest that Assembly counsel and the Department of Law confer on this issue, as it is the Municipality's lawyers that are in the best position to interpret the nuances of law. That said, I hope that the following outline of the Administration's position may be helpful:

With respect to Assembly approval of "larger-dollar contracts" and amendments, I recognize that the Assembly has long required that it approve such contracts in furtherance of its Charter-assigned power of appropriation. That does not mean,

however, that further Assembly action is necessary as a consequence of AO 2022-105. As the Mayor stated in his veto of Ordinance 2022-105:

Integral to the separation of powers doctrine is that the allocation of assets between competing needs is a legislative function that is properly exercised through the power of appropriation,¹ and no other branch of government may “intrude upon the legislature's power to appropriate funds”.² Conversely, whether or how to proceed with claims, and whether or how to dispose of claims, is an executive branch power that is not subject to the control of other branches of government.³ The Alaska Supreme Court has taught that the legislative power of appropriation is properly balanced against the executive power of settling a claim when the executive branch may issue a warrant against an existing legislative appropriation for the sum the executive branch finds is due to a claimant “if a sufficient appropriation exists for payment, or the department may recommend to the legislature that it appropriate a sum to cover the payment” if there is no existing appropriation.⁴

Even if AO 2022-105 is constitutional, however, and the Assembly’s power is not constrained by Charter § 5.05 or the separation of powers doctrine, the Assembly has already approved payment of amounts up to \$4,900,000 for costs incurred in “construction of an adult shelter and/or navigation center” when it passed AR 2022-111 (S) as amended. Moreover, AM 207-2022 (A), which accompanied AR 2022-111 (S), further made clear that the Assembly contemplated that these funds would be used to pay costs of “the project’s construction” that were, at that time, “currently in negotiations”. The substance of the “negotiations for the project’s construction” referenced in AM 207-2022 is now embodied by the claim of RHC. Thus, the condition established by AO 2022-105 is satisfied in this instance by AR 2022-111(S).

As to whether the “purpose of the appropriation” made in AR 2022-111 (S) has been “abandoned”, we respectfully disagree. Work has ceased, at least for the time being, on construction of the Tudor Road Navigation Center, however, discussions between the Administration and the Assembly on this issue occurred as recently as January 24, when Chair LaFrance met with the Mayor to discuss the “navigation center” and “how to move this project forward”. Providing a viable long-term solution for

¹ Alaska Action Center, Inc. v. Municipality of Anchorage, 84 P.3d 989 (Alaska 2004).

² State v. Dupere, 709 P.2d 493 (Alaska 1985).

³ Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975).

⁴ State v. Dupere, 709 P.2d 493 (Alaska 1985). See also Anchorage Charter § 5.05, granting executive branch authority to “pay money on vouchers drawn against appropriations”.

accommodating homeless individuals within the Municipality has not been abandoned, even if the Administration and Assembly members don't always see eye to eye on the optimum approach to be taken. However, even if it could be asserted that the Navigation Center was abandoned, which it was not, any such abandonment would be irrelevant where it is the purpose of the appropriation addressed by Charter Section 13.07. As your letter pointed out, the Charter mandates that the appropriation in AR 2022-111 (S) does not lapse "until the purpose of *the appropriation* has been accomplished or abandoned". (Emphasis added.)

The purpose of the appropriation, as stated in AR 2022-111 (S), was to pay costs associated with "construction of an adult shelter and/or navigation center". In addition to the RHC claim, there are still likely to be costs associated with the fact that transportation of the building itself has been paused, as the building is currently in storage while enroute to Anchorage. The purpose of AR 2022-111 (S) will not have been accomplished until those costs are addressed with finality, until the RHC claim is addressed with finality, and at least until a final determination has been made with respect to how to move the Navigation Center project forward. Further, so long as the Administration has open or anticipated claim(s) seeking payment for Navigation Center expenses, and so long as there are efforts to move the project forward, the purpose of the Appropriation has not been abandoned.

Because the appropriation in AR 2022-111 (S) has not lapsed, your references to the general government operating and capital budgets adopted by the Anchorage Assembly for 2023 are misplaced. AR 2022-111 (S) addresses 2022 funding and was not affected by the 2023 Capital budget.

Your letter also mentions obtaining approval of the settlement under AMC 7.15.040. I believe that the Administration's position was made clear in the veto of AO 2022-105 quoted above. However, claim settlements are not contracting actions governed by the procurement provisions of AMC 7.15.040.

There is no question but that Roger Hickel Contracting provided the materials and services encompassed by the proposed settlement, and there is no question that RHC was acting in reliance upon Municipal employees who directed its work when those materials and services were furnished to the Municipality. Regardless of the past, RHC should be paid for the work that was done. Any failure to effectuate the settlement as outlined in my earlier Memo to the Assembly will certainly result in costly litigation that will needlessly drain Municipal resources that can be better used for addressing the many needs of Anchorage citizens. Nor will harm experienced by the Municipality be limited to the costs of litigation, which include not only our costs, but also any interest, fees, and costs to be reimbursed to RHC in the event it obtains a judgment.

My office has attempted to address this situation in a dispassionate manner. We ask that the Assembly leadership do so also. We should each recognize that a refusal to settle with RHC now may have a chilling effect on our future ability to successfully contract with others and may negatively impact the levels of trust and cooperation that the Municipality currently enjoys within so many of its vendor relationships. Not only will potential contractors think twice about whether they may receive payment for services if the Municipality tries to avoid payment on this matter, and not only is it likely that some of the reticence of potential bidders will result in higher costs for goods and services, but bonding capabilities and creditworthiness could also suffer.

I hope that the above clarifies the position of the Administration underlying the memo I previously sent you. For all the foregoing reasons, I hope you will agree that the decision to pay RHC on March 24th is not only lawful and appropriate but also the right thing to do. Even if you don't concur with everything in this letter, I hope the Assembly will recognize that allowing payment to proceed is in the overall best interests of the Municipality.

Sincerely,



Kent Kohlhase, P.E.
Acting Municipal Manager

Cc: Mayor Dave Bronson
Dean Gates, Assembly Counsel

Assembly votes to postpone disputed payment

By NATHANIEL HERZ nherz@adn.com Staff November 6, 2013 Publication: Anchorage Daily News (AK) Page: A14 Word Count: 206

Anchorage Assembly members voted Tuesday evening to postpone paying a \$5 million bill they say they got stuck with for work that a Municipal Light and Power contractor did without their approval.

The city-run power company allowed Roger Hickel Contracting to do \$4.95 million in work at a site off the Glenn Highway, where MLandP is preparing to build a new power plant.

The contractor ran into delays and needed to do extra work because of the presence of federally protected migratory birds, the discovery of "excess unusable soils," and the unexpected need for additional structural materials, according to documents that MLandP presented to the Assembly.

Under city code, MLandP was supposed to get Assembly approval before allowing the contractor to do the work, but it didn't.

After several Assembly members sharply criticized MLandP General Manager Jim Posey at the Tuesday meeting, Assemblyman Tim Steele introduced a measure to postpone a decision on paying the bill until January.

That was approved by an 8 to 3 vote. Steele said he hopes that the city can come to a negotiated settlement with Roger Hickel Contracting in the meantime -- though Sullivan administration officials cautioned that it could be tough to win any concessions.

"The contractor acted in good faith," said Municipal Manager George Vakalis.

Anchorage Daily News (AK)

Date: November 6, 2013

Page: A14

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Clerk's Note: Motion to postpone action on AM 621-2013 to January 28, 2014 passed on November 5, 2013. Notice of Reconsideration was given by Ms. Johnston on November 6, 2013.
MUNICIPALITY OF ANCHORAGE
Reconsidered 11-19-13.

ASSEMBLY MEMORANDUM

CLERK'S OFFICE

AMENDED AND APPROVED

No. AM 621-2013

Date: 12-3-13

Meeting Date: November 5, 2013

Motion to pay off the balance of \$1,341,662.46
passed 12-3-13

1 From: MAYOR

2

3 Subject: Change Order No. 2 to Roger Hickel Contracting, Inc. for the Plant 2A
4 South Staging and Storage Area and Gas Piping Upgrades Project,
5 Contract No. C-20134106, Municipal Light & Power (ML&P)
6 (\$4,950,116.67)
7

8 In April of 2013, ML&P entered into a contract with Roger Hickel Contracting for
9 construction and development of the Plant 2A South Staging and Storage and Gas
10 Piping Upgrades Project. This project, which is now under construction, involves
11 replacing and realigning the existing natural gas piping to the existing generation
12 plant; providing for an additional high pressure gas connection point for future use
13 by the new Plant 2A; developing approximately five acres of native land as a staging
14 and storage area; installation of new high voltage conduit raceways; installation of
15 in-field storm water retention systems; and other ancillary work.
16

17 Change Order No. 1 was issued for electrical design changes to meet NEC code;
18 removal of initial excess unusable soils from the project site; and for
19 stockpiling/handling and hauling of structural fill material above project bid
20 quantities. This Change Order resulted in an increase of \$372,439.85 to the
21 contract.
22

23 Proposed Change Order No. 2, in the amount of \$4,950,116.67, provides additional
24 contingent funding and identifies all known costs to complete the project. The
25 magnitude of this change order is due to unknown quantities of organic materials
26 deposited on to the site at some point in the past; project start delays due to
27 migratory birds nesting within the site; delayed receipt of the BLM driveway permit;
28 and a compressed project schedule. As detailed in the attached Departmental
29 Memorandum, the following summary represents the increased costs and additional
30 work under this change order request:
31

32	• Removal of Excess Unusable Soils	\$ 1,168,725.60
33	• Stockpiling/Handling of Import Material	\$ 28,531.92
34	• Type IIA Structural Material Import	\$ 1,112,963.00
35	• Additional Crews & Equipment due to Delays	\$ 1,341,662.46
36	• Stormwater Retention System Re-design/Upsizing	\$ 536,847.22
37	• Additional Civil Design Changes	\$ 398,388.55
38	• Misc. Design Clarification/Variation Costs	\$ 362,997.92
39		
40	TOTAL Change Oder No. 2	\$ 4,950,116.67

41

1 It is noted that ML&P and Hickel Contracting, Inc. have worked diligently to keep this
2 project on schedule in light of the setbacks and delays impacting this project. It is
3 also noted that the continuation of work without proper notification or approval of a
4 change request through the Assembly is outside of the department's authority. The
5 Administration has addressed this issue with the department and has been assured
6 that any future projects or change order needs will be processed in accordance with
7 Municipal Policy and in compliance with AMC Title 7 accordingly.

8
9 Based upon the above information and attached Department Memorandum, it is
10 respectfully requested that Change Order No. 2 to Contract No. C-20134106 to
11 Hickel Contracting, Inc. be approved in the amount of \$4,950,116.67 for a total
12 revised contract amount, not to exceed \$10,719,731.52.

13
14 Prepared by: Ronald S. Hadden, Purchasing Officer

15
16 Fund Certification: Lucinda Mahoney, CFO
17 531-M3120-1071-M10956-BP 2013 - \$4,950,116.67
18 (2013 Capital)

19
20 Concur: George J. Vakalis, Municipal Manager

21
22 Respectfully Submitted: Daniel A. Sullivan, Mayor
23



DATE: October 23, 2013

TO: Ron Hadden, Purchasing Officer, MOA

THRU: *Richard E Miller*
For James M. Posey, General Manager, ML&P

THRU: Eugene Ori, Acting Generation Manager, ML&P *Eugene Ori*

THRU: Kevin Mitchell, Plant 2 Superintendent, ML&P *K. Mitchell*

FROM: Jon Rivera, Project Manager, ML&P *K. Mitchell for Jon Rivera*

SUBJECT: Change Order No. 2 to PO 20134106 with Roger Hickel Contracting, Inc.
Plant 2A SSSA and Gas Piping Upgrades
Tracking No. GEN#82-13

It is requested that Assembly action be initiated for approval of Change Order No. 2 to Purchase Order No. 20134106 with Roger Hickel Contracting, Inc. This change order will increase the contract by \$4,950,116.67, for a revised contract amount of \$10,719,731.52. The original contract award was approved in the amount of \$5,397,175.00. As part of this original award, contract change order authority was authorized in the amount of \$375,000 pursuant to AMC 7.15.080 A.4.

This original project consisted of: replacing and realigning the existing natural gas piping to the existing generation plant; providing for an additional high pressure gas connection point for future use by Plant 2A; developing approximately five acres of native land as a staging and storage area; installation of new high voltage conduit raceways; installation of in-field storm water retention systems; and other ancillary work. With exception of the natural gas piping replacement to the existing plant, the remaining work is in support of the new Plant 2A Expansion Project that is scheduled for formal Notice to Proceed within next 45 days. Detailed plans and specifications for the Plant 2A SSSA and Gas Piping Upgrades was issued through Invitation to Bid (ITB) No. 2013C015 and was subsequently approved through Assembly Memorandum AM 257-2013, dated April 23, 2013.

The following summarizes the Change Orders issued to date, and the additional work required under Change Order No. 2 to complete this project:

Change Order No. 1 was issued for electrical design changes to meet NEC code and for initial excess unusable soils required to be removed from the project site and for stockpiling/handling and hauling of structural fill material above project bid quantities. Change Order #1 increased the contract amount by \$372,439.85 for a revised contract amount of \$5,769,614.85.

Proposed Change Order No. 2 identifies all known additional costs to complete the project. The magnitude of this change order is due to unknown quantities of organic materials deposited on to the site at some point in the past; project start delays due to migratory birds nesting within the site; delayed receipt of the BLM driveway permit; and a compressed project schedule. The significance of these impacts strained both the contractor's resources as well as ML&P's resources in realigning the various sub-contractors work to maintain scheduled outages for testing and cutover to the newly installed gas pipe lines serving the existing turbine plant. All planned utility outages are scheduled and approved well in advance among all railbelt utilities in order to assure adequate generation capabilities are available to support the electrical grid. Re-adjusting or changing these generation resources is difficult as the other operating utilities have their planned maintenance and outages racked and stacked within this schedule as well.

Along with these challenges, additional geotechnical investigations were required to assure no detrimental impacts would be encountered due to the potential lateral flow of storm water from the planned in-field stormwater retention systems. The revised depth and size of these retention systems could undermine both the planned installation of the new gas line as well as potentially destabilizing the embankment on the south side of the new Plant 2A building site. The coordination of these impacts culminated with substantial additional resources and equipment to be deployed to maintain completion of the project within the current construction season. The completed development of this site is needed and will be turned over to the recently approved EPC Contractor for immediate use for the construction of the new Plant 2A Generation Project.

In keeping this project on schedule, Hickel Construction and their sub-contractors adjusted their resources and have diligently worked to keep this project on track. Likewise, ML&P in coordination with Hickel Construction endeavored to solidify the increased materials, labor, and equipment impacts under evolving project conditions. It is acknowledged that ML&P has incurred substantial increases on this project and in hindsight should have noticed the Administration and Assembly of the potential cost impacts.

The following items represent the increased costs and additional worked required under proposed Change Order No. 2:

Excess Unusable Soils and Associated Structural Fill

During construction of the South Staging and Storage Area, excess unusable soils (soils not meeting Municipality of Anchorage Standard Specifications M.A.S.S. structural requirements) were discovered in amounts significantly above estimated quantities listed in the bid documents. To deal with this changed condition, the Contractor agreed to round robin haul, as much as possible, unusable soils from the project site and on the return side, import structural material back to the project site. The Contractor agreed to limit one-way hauling, stockpiling and double-handling of the import material as much as possible. Below is a breakdown of the costs for these activities.

Excess Unusable Soils

Estimated Bid Quantity: 14,600 cubic yards

Change Order #1 amount: 11,040 cubic yards @ \$17.65/cy (Round Robin)

Change Order #2 amounts:

Export Haul (Round Robin) → 36,850 cubic yards @ \$17.65/cy

Export Haul (One-Way) → 14,310 cubic yards @ \$27.41

1200 East First Avenue • Anchorage, Alaska • 99501-1685

Phone 907.279-7671 • Fax 907.263.5862

www.mlandp.com

Estimated Export Haul (One-Way) remaining → 4,600 cy @ \$27.41/cy

Sub-Total: \$1,168,725.60

Stockpiling/Handling of Import Material

Change Order #1 amount: 20,103.56 tons @ \$5.95/ton

Change Order #2 amounts: Additional Handling → 4,795.28 @ \$5.95/ton

Sub-Total: \$28,531.92

Excess Type IIA Structural Material Import

Estimated Bid Quantity: 66,400 tons

Change Order #2: Qty. Above Bid Estimate → 38,521.25 tons @ \$15.20/ton

Estimated remaining → 34,700 tons @ \$15.20/ton

Sub-Total: \$1,112,963.00

The net increase total of **\$2,310,220.52** includes the estimated amounts to project completion. Costs to be paid to contractor will be based upon actual quantities removed/delivered at the site.

Cost Impacts Due to Migratory Bird Treaty Act

There are significant cost impacts to the Contractor and its subcontractors as a result of the delayed start date. As directed within the Contract documents, the Contractor initiated a Bird Watch Survey in order to comply with the federal Migratory Bird Treaty Act (MBTA). The presence of several species of wildlife protected under this act were detected which prevented the Contractor from performing any clearing/grubbing activities. As a result, the Notice-to-Proceed that was given to the Contractor on May 8, 2013 was effectively postponed until July 16, 2013.

In order to maintain the project schedule, the Contractor (and its subcontractors) had to work extended hours and significantly increase their manpower and equipment. Below is a cost breakdown of these additional costs.

General Contractor: Roger Hickel Contracting, Inc.	\$ 651,807.70
Electrical Subcontractor: Redi Electric, LLC	\$ 429,256.62
Mechanical Subcontractor: Udelhoven Oilfield System Services, Inc.	\$ 241,312.64
Pipe Coating Subcontractor: DAMA Industrial, LLC	\$ 19,285.50
Total	\$1,341,662.46

Stormwater Retention System Re-Design/Upsizing

As additional excavation was required to remove unusable soils from the site, it became more cost effective to re-design/upsized the planned stormwater retention systems. The original bid design (without a paved surface) provided for a certain amount of stormwater to naturally percolate over the entire site surface. With the need to over excavate the unsuitable materials, it became more cost effective to upsize the retention systems to accommodate the future use of the SSSA Site for longer term needs of the Utility. This re-design considered a paved surface with containment systems adequately sized to account for the additional stormwater storage

capacity. By designing the site with a hard pavement surface, stormwater would be prevented from naturally draining into the ground. As such, the stormwater would be concentrated at the retention systems requiring increased capacity. To accommodate the re-designed retention systems, a lump sum price of **\$536,847.22** has been added to the contract price.

Cost Impacts Due to Additional Civil Design Changes/Scope of Work

Design change requirements were brought forth by the MOA Building Permit Plan Review Office that included the addition of a third stormwater retention system on the project site and additional slope stabilization work. This additional scope of work resulted in a lump sum increase of \$161,343.00.

Other civil work was necessary for the following areas in order to achieve a structural base for the roadways and storage areas:

- Excavation of existing natural gas pipelines to facilitate the construction of the South Staging and Storage Area prior to the scheduled shut downs for the gas piping cutovers. Lump sum increase of \$103,528.98.
- Additional excavation/hauling and backfilling due to unusable soils located in Pioneer Drive to a depth of 7 feet to remove logs and trees. Lump sum increase of \$37,723.60.
- Removal of excess unusable soils under the existing gas lines. The original bid specified the natural gas pipelines to be abandoned in place. However, the pipelines had to be removed in order to excavate the unusable soils located in the structural roadway. Lump sum increase of \$59,282.77.
- Limited excavation and stabilization of a 2:1 slope that was laden with logs, stumps and other organic materials. Rather than chase the unusable soils into the slope in a non-structural area, it was more feasible to excavate the slope to a 2 foot depth and install rip rap rock to stabilize the slope. Lump sum increase of \$36,510.20.

These changes are accounted for in a lump sum increase of **\$398,388.55**.

Miscellaneous Design Clarification/Variation Costs

The remainder of the cost increases are due to necessary electrical and mechanical field modifications due to existing utilities/obstructions encountered during construction. These changes are accounted for in a lump sum increase of **\$362,997.92**.

Revised Completion Date

In addition to the change order increases noted above, a 45 day time extension will be provided to the Contractor for completion of the **above-ground electrical work ONLY**. Extension is due to the electrical subcontractor's schedule impact which was beyond their control. The underground electrical work will be completed by the original contract completion date.

Based on the above information, it is requested that Change Order No. 2 be approved for an amount not to exceed \$4,950,116.67. The contract summary is as follows:

Original Award	\$	5,397,175.00
Change Order 1 (Increase)	\$	372,439.85
Change Order 2 (Increase Contract Amount by \$4,950,116.67)	\$	<u>4,950,116.67</u>
REVISED CONTRACT AMOUNT		\$10,719,731.52

Funds are available in PSFIS

531 – M3120 – 1071 – M10956 – BP 2013 \$ 4,950,116.67
(2013 Capital)

Richard E Miller 10-24-13

Richard E. Miller, Chief Financial Officer and Assistant General Manager, ML&P



NOTICE OF RECONSIDERATION

I hereby file notice of reconsideration on the following item from the Agenda of the November 5, 2013 Regular Meeting of the Anchorage Municipal Assembly:

Item 9.D.9: Assembly Memorandum No. AM 621-2013, Change Order No. 2 to Roger Hickel Contracting, Inc. for the Plant 2A South Staging and Storage Area and Gas Piping Upgrades Project, Contract No. C-20134106, Municipal Light & Power (ML&P) (\$4,950,116.67), Purchasing Department.

I voted on the prevailing side of the item.

Dated this 6th day of November 2013.



Jennifer Johnston, Assembly Member

Seconded by: _____

-----Original Message-----

From: Demboski, Amy

Sent: Wednesday, November 06, 2013 1:23 PM

To: Jones, Barbara A.

Cc: Johnston, Jennifer

Subject: Second for motion to reconsider ML&P change order.

Importance: High

Barbara,

I will second the motion to reconsider the ML&P / Roger Hickel contract change order.

Respectfully,

Amy Demboski

Assembly Member

Chugiak, Eagle River & JBER

Barbara,


11/6/13

I wish to second the
motion to reconsider item 9D9.
AM No. AM621-2013, Change Order
No 2 to Roger Hikkel Contracting, Inc.
for Plant 2A South Staging and Storage
Area and Gas Piping Upgrades Project.

Respectfully,

Amy Demboski

Amy Demboski
Assembly Member

signed at 7:48 pm
on 11/6/13. 



MUNICIPALITY OF ANCHORAGE

ASSEMBLY INFORMATION MEMORANDUM

No. AIM 129-2013

Meeting Date: November 19, 2013

1 From: Mayor

2
3 Subject: Additional Information to AM 621-2013, Change Order No. 2 to Roger
4 Hickel Contracting, Inc. for the Plant 2A South Staging and Storage Area
5 and Gas Piping Upgrades Project, Contract No. C-20134106, Municipal
6 Light & Power (ML&P) (\$4,950,116)
7
8

9 The following additional information is presented for the Assembly's review as a result
10 of actions taken at the November 5, 2013 meeting.
11

12 Negotiations were conducted between ML&P and the contractor prior to submission of
13 No. AM 621-2013.

- 14 • Contractor agreed during negotiations to minimize one way hauling and double
15 handling during the removal of excess Unusable Soils.
16 • Additionally, the contractor agreed that charges would be invoiced based on the
17 actual number of trips, thus the \$2,310,220.52 amount is an estimated not to
18 exceed amount and not a firm fixed dollar amount as are the other elements that
19 were negotiated.
20

21 Pursuant to the direction of the Assembly, Ronald Hadden, Purchasing Officer for the
22 Municipality, approached the contractor on November 6, 2013 to determine if there was
23 a willingness to reopen negotiations. I was informed that negotiations had been
24 conducted with ML&P and were complete from their perspective. In addition, the
25 contractor is remaining on site to complete the project on time thus not jeopardizing the
26 schedule for the Power Plant 2 expansion per the contractual agreement.
27

28 Prepared by: Ronald S. Hadden, Purchasing Officer

29
30 Concur: Lucinda Mahoney, CFO

31
32 Concur: George J. Vakalis, Municipal Manager

33
34 Respectfully submitted: Daniel A. Sullivan, Mayor

MUNICIPALITY OF ANCHORAGE
ASSEMBLY INFORMATION MEMORANDUM

No. AIM 139-2013

Meeting Date: December 3, 2013

1 **From:** **MAYOR**

2
3 **Subject:** Supplemental Information to AM 621-2013, Change Order No. 2 to Roger
4 Hickel Contracting, Inc. for the Plant 2A South Staging and Storage Area
5 and Gas Piping Upgrades Project, Contract No. C-20134106, Municipal
6 Light & Power (ML&P) (In the Remaining Amount of \$1,341,662.46)
7
8

9 During the Assembly meeting of November 19, 2013, the subject Assembly
10 Memorandum was bifurcated and was subsequently approved in the reduced amount of
11 \$3,608,454.21. The remaining Change Order request, in the amount of \$1,341,662.46,
12 was postponed until the meeting of December 3, 2013 pending additional information
13 regarding directed delays and costs associated with the project, and more specifically, the
14 Migratory Bird Treaty Act (MBTA). The following supplemental information is being
15 provided to assist the Assembly in understanding the delays, and ML&P's role as it
16 relates to the permitting, MBTA, and associated cost impacts.
17

18 Permits: This project began in early March of 2013, as CRW and Coffman (the two
19 engineering firms acting on behalf of ML&P) entered into pre-planning review services
20 with the Municipal Plan Review office. The entire engineered permit package was
21 transmitted to the Plan Review Office on May 7, 2013, and the resulting permit was
22 issued on June 17, 2013 (within the standard turn-around times for plan
23 review/permitting).
24

25 For clarification purposes, the submission and any associated plan review corrections are
26 the responsibility of ML&P as this was a fully designed/engineered project (engineer of
27 record) on behalf of ML&P. As the permit was not approved until June 17, 2013, the
28 project delay through June 17th is ultimately the responsibility of the Owner, ML&P.
29

30 Migratory Bird Treaty Act (MBTA): The MBTA "nesting bird window" for land clearing
31 activities is in effect between May 1st and July 15th of the calendar year. Any planned
32 clearing and grubbing activities during this window is not necessarily impossible, but does
33 require additional precautions and surveys to be performed in conjunction with any follow-
34 on clearing & grubbing activities. Additionally, any clearing activities would need to be
35 executed quickly in coordination with any bird survey work, as the population of nesting
36 birds can change rapidly in the nesting season.
37

38 RHC commissioned the bird survey within three (3) days of receiving the building permit
39 to determine the extent of nesting birds on the site. As also required under the contract,
40 RHC notified the U.S. Fish & Wildlife (USFW) of the proposed clearing activities that
41 might be undertaken within the bird window. This drew an immediate reaction from
42 USFW regarding its concern about allowing any work to occur during the bird window.

1
2 Ultimately, the bird survey did establish the presence of nesting birds, and with the
3 cautionary call from USFW, ML&P directed RHC to postpone any clearing and grubbing
4 activities until July 16, 2013.

5
6 Delays: As indicated, the delay in the permitting process until June 17th and the directed
7 postponement of work during the bird window until July 16th, effectively removed ten (10)
8 weeks of time early in the construction season. Compounding this delay was the fact that
9 ML&P had not received an anticipated driveway permit from BLM that essentially limited
10 access to a single point for all site ingress and egress activities.

11
12 Schedule: Separate from the delays above, but in context with performance under the
13 Contract, ML&P had a series of coordinated activities and work that was driving the need
14 to complete the project within the original time schedule, i.e. gas line cutover and
15 associated shut down of generation facilities; need for completion of extensive electrical
16 work; and ultimate site turnover to the follow-on EPC Contractor. Revising or deferring the
17 completion of the RHC contracted work into the winter of 2013, or extending into the
18 spring of 2014, would be expensive and would undoubtedly incur delay costs and added
19 expense to the follow-on EPC Contractor. As such, ML&P required that the project be
20 completed within the original 2013 schedule, and further requested RHC to adjust their
21 performance of work in light of the compressed completion schedule.

22
23 Impacts: As required under MASS (Municipality of Anchorage Standard Specifications)
24 RHC officially noticed ML&P on June 27th that there would be additional cost impacts to
25 maintain the project completion schedule in light of the ten (10) week delay in the start
26 schedule. These additional cost impacts required RHC to provide additional manpower
27 and resources, extend work hours (7x12), and provide additional equipment in order to
28 maintain the completion schedule as required by ML&P.

29
30 In Summary: The cost impacts associated with this change order are directly attributable
31 to the additional labor, resources, and equipment required to maintain the project within
32 the compressed completion schedule. Although MASS allows for it, RHC has not
33 requested, nor has ML&P authorized, any stand-by, delay, or suspension costs on this
34 contract.

35
36 As a final clarification, in its memorandum dated October 23 submitted with AM 621-2013,
37 ML&P inadvertently used a paragraph header that described the cost impacts of this
38 element of the change order as being solely "Cost Impacts due to Migratory Bird Treaty
39 Act". While the MBTA decision did delay the start of the project for about a month, it is not
40 the sole source of the costs. The request for contract authority for the \$1.3 million is
41 attributable to the compressed completion schedule requested by ML&P. ML&P
42 requested the compressed schedule to keep the entire project on track. It was a
43 business decision made in the best interest of ML&P ratepayers, necessitated by a
44 number of factors.

45
46 Prepared by: Eugene Ori, Acting ML&P Generation Manager
47 Approved by: James M. Posey, ML&P General Manager
48 Concur: Ronald S. Hadden, Purchasing Officer
49 Concur: George J. Vakalis, Municipal Manager
50 Respectfully submitted: Daniel A. Sullivan, Mayor