



# 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 Kohlhasse  
632 W. 6<sup>th</sup> 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. Kohlhasse:

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 amendments<sup>1</sup>:

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<sup>1</sup> 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.<sup>2</sup>

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:

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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.** .

<sup>2</sup> 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).<sup>3</sup>

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 2022-496<sup>4</sup> 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.<sup>5</sup>

We therefore request:

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<sup>3</sup> 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>

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

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

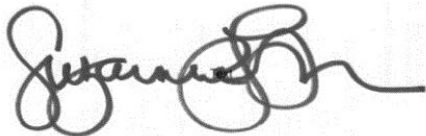
- (1) that the Administration prepare and submit to the Assembly resolutions for the following for the body to consider:
  - (a) to secure the Assembly approval required by AMC 7.15.043, and
  - (b) to appropriate and make available to the Administration funds to pay the proposed settlement; and
- (2) 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.**

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**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.<sup>1</sup> The proposed new AMC 7.15.043 would serve as a companion piece and provide that no payment for services or

<sup>1</sup> 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.

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4 It is recommended the Assembly approve this ordinance.

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6 Prepared by: Assembly Counsel's Office

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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".<sup>1</sup> 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,<sup>2</sup> and as the Superior Court instructed the Assembly earlier this year, it is enshrined in Anchorage's Charter.<sup>3</sup> Complementing the separation of powers doctrine is the doctrine of checks and balances.<sup>4</sup> Both doctrines address and are designed to preclude encroachments by one branch of government on the powers of another,<sup>5</sup> and thereby safeguard the independence of each branch of government.<sup>6</sup>

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

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

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

<sup>3</sup> Bronson v. Assembly, 3AN-21-08881Civ.

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

<sup>5</sup> Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

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

effectively redrafting defective statutes,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> and no other branch of government may “intrude upon the legislature’s power to appropriate funds”.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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

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

<sup>8</sup> Mathis v. Sauser, 942 P.2d 1117 (Alaska 1997).

<sup>9</sup> 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.

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

<sup>11</sup> State v. Dupere, 709 P.2d 493 (Alaska 1985).

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

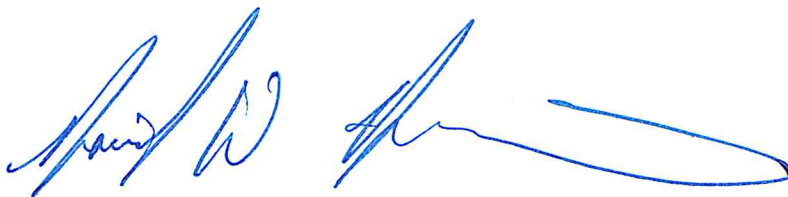
<sup>13</sup> State v. Dupere, 709 P.2d 493 (Alaska 1985). See also Anchorage Charter § 5.05, granting executive branch authority to “pay money on vouchers drawn against appropriations”.

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,<sup>14</sup> 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. The first signature is on the left and the second is on the right. Both are stylized and cursive.

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<sup>14</sup> 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).**