Municipal Clerk's Office
Approved
Date: December 20, 2022

Submitted by: Assembly Vice Chair Constant
Reviewed by: Assembly Counsel's Office
For reading: November 22, 2022

ANCHORAGE, ALASKA
AO No. 2022-105

1 **AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY REQUIRING**
2 **ASSEMBLY APPROVAL OF PAYMENTS, PURSUANT TO A LEGAL**
3 **SETTLEMENT OR OTHERWISE, FOR SUPPLIES, SERVICES,**
4 **PROFESSIONAL SERVICES OR CONSTRUCTION THAT WERE NOT**
5 **PROVIDED OR PERFORMED IN ACCORDANCE WITH ANCHORAGE**
6 **MUNICIPAL CODE 7.15.040 *ASSEMBLY APPROVAL OF CONTRACTS.***
7
8 **WHEREAS,** in accordance with common municipal practice, long-standing local
9 law codified as Anchorage Municipal Code section 7.15.040 *Assembly Approval of*
10 *Contracts* provides that "No contract for supplies, services, professional services
11 or construction whereby the municipality is obligated to pay more than
12 $500,000.00 pursuant to a contract awarded through competitive procedures,
13 which are described in sections 7.20.020 through 7.20.040 (bids) and 7.20.060
14 (proposals), or more than $30,000.00 including any amendment pursuant to
15 contracts awarded under section 7.20.080A.5, or more than $50,000.00 pursuant
16 to contracts awarded through other authorized procedures, may be executed
17 unless the assembly has approved a memorandum setting forth the essential
18 terms of the contract";
19
20 **WHEREAS,** Anchorage Municipal Code section 7.15.020 *Contracts Enforceable*
21 *Against Municipality* provides that "No contract for supplies, services, professional
22 services or construction, or any amendment thereto, may be enforced against the
23 municipality unless its terms have been approved in accordance with this chapter
24 [7.15] and unless the contract or amendment thereto has been set forth in a writing
25 executed in accordance with this chapter";
26
27 **WHEREAS,** any contract to that purports to authorize payment in excess of the
28 amounts listed in AMC 7.15.040 cannot be lawfully executed without prior
29 assembly approval of the essential terms of the amendment, and so is void;
30
31 **WHEREAS,** as noted in Attachment A, a general principal of municipal law is that
32 "if a contract is within the corporate power of a municipality but the contract is
33 entered into without observing mandatory legal requirements specifically
34 regulating the mode by which it is to be exercised, there can be no recovery under
35 the contract" and "the mere fact that the municipality has received benefits does
36 not make the municipality liable, either on the theory of ratification, estoppel, or
37 implied contract";
38
39 **WHEREAS,** the treatise notes that the rationale behind municipalities and courts
40 typically refusing to enforce contracts that were entered into illegally, or to allow a
41 contractors to recover for work performed pursuant to an illegal contract is that "if
42 the municipality is allowed to disregard the formalities and the other contracting
43 party is, nevertheless, permitted to recover for the property delivered or the
44 services rendered, either on the ground of ratification, estoppel, or implied
45 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:

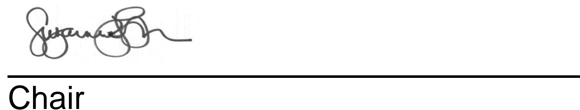
Section 1. Anchorage Municipal Code chapter 7.15 is hereby amended by adding a new section 7.15.043, to read as follows:

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.

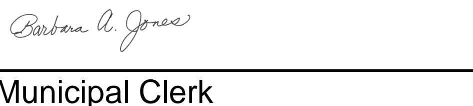
Section 2. This ordinance shall be effective immediately upon passage and approval by the Assembly.

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



Chair

ATTEST:



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

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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.

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

It is recommended the Assembly approve this ordinance.

Prepared by: Assembly Counsel's Office

Respectfully submitted: Christopher Constant, Assembly Vice Chair
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

> 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

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.")