

SB

424

Original sponsors: Jones, Fischer,
Fanning and Abood

1 IN THE SENATE

BY THE COMMUNITY AND REGIONAL
AFFAIRS COMMITTEE

2 CS FOR SENATE BILL NO. 424 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to procurement by the Department of
7 Transportation and Public Facilities from certain
8 entities."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 36.30 is amended by adding a new section to read:

11 Sec. 36.30.760. PROHIBITION AGAINST CERTAIN CONTRACT AWARDS. If
12 the Department of Transportation and Public Facilities solicits bids
13 for a construction contract over \$150,000 by issuing an invitation to
14 bid under AS 36.30.100 - 36.30.190 or a request for proposals under
15 AS 36.30.200 - 36.30.270, the Department of Transportation and Public
16 Facilities may not award the contract to a bidder or offeror who is a
17 state agency, a political subdivision of the state, a partnership
18 whose partners include a state agency or political subdivision of the
19 state, or a joint venture whose venturers include a state agency or
20 political subdivision of the state. In this section, "political
21 subdivision" includes school districts.



UTILITY CONTRACTORS OF ALASKA, INC.

Alaska Chapter of the National Utility Contractors Association

P.O. Box 112628 • Anchorage, Alaska 99511-2628 • (907) 349-4731

Kie

April 13, 1988

Arliss Sturgulewski
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

Re: Senate Bill 424

Dear Senator:

Once again we are requesting your support in passage of SB 424. Since our previous letter of April 4, 1988, we have come to obtain more data which we feel should be brought to your attention, and we hope will persuade you to vote in favor of this bill.

The facts which we are about to outline not only justifies passage of SB 424, but also are serious enough, we feel, to call for cancellation of DOT&PF contract AIP 3-02-0160-04/60434, Kotzebue Airport Improvements, which was the primary cause for the generation of SB 424.

When the Joint Venture firm of the City of Kotzebue/K.I.C./R.S. Store, Inc. (J.V.) was awarded the contract none of the firms were licensed as a contractor, as required by Alaska Statute:

08.18.011(a) requires an entity be registered prior to bidding or working as a contractor. (See attachments 6, 7, 8, 9, 10, and 11).

The award was allowed by Mr. Bob Venusti, Chief of Technical Services, DOT&PF, as per his December 2, 1987 memo (attachment #1) which allows R. S. Store, Inc. to use the contractor's license of R. S. Construction. This fact was apparently allowed by Mr. Venusti after the J.V.'s attorney, Mr. Jerald M. Reichlin, submitted a letter on October 13, 1987 (attachment #2), stating, "The name R. S. Construction is more a result of scrivener's error than anything else. The application was incorrectly filled out and all operations under the license have been carried out by R. S. Stores, Inc. R. S. Construction has always been regarded as a d/b/a of R. S. Stores."

April 13, 1988

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If a prudent investigation on the part of the DOT&PF had been conducted, this apparent unlawful activity would not have been allowed to happen. A recent Alaska Court Case, SUMNER DEVELOPMENT CORPORATION V. SHIVERS, Alaska. 517 P.2d 757 (attachment #3), which states in part, "We further reject the notion that Shivers can claim compliance with the licensing statutes by "sheltering" under the license bond of another company. Such a theory disregards basic principles of suretyship and undermines the licensing statutes."

Alaska Statute 08.18.051(a) forbids a registered contractor from working under any other name unless that name is also registered.

R. S. Construction was registered as a contractor under registration number 10699. This company has as its listed owner, R. S. Store, Inc. Contrary to the implication of Jer. Id Reichlin, attorney for the J.V., in his October 13, 1987, letter, (attachment #2), this was not a one time administrative error as the registration has been renewed four times since the initial application, and could have been changed any one of those times. The initial registration was dated June 24, 1982 (attachment #4).

These facts were all pointed out by letter (attachment #5), to Mr. Jerald Reichlin on January 7, 1988, by Mr. Randall Burns, Director of Occupational Licensing. As a part of this letter, attachments were made that show on November 18, 1986, and January 22, 1987, R. S. Store, Inc. was notified by certified mail they could not work as R. S. Store, Inc. under R. S. Construction's registration number 10699. Yet, R.S. Store, Inc. still renewed the registration after receiving the letters.

This issue of registration is further clarified by "Attestation of Official Record" (attachments # 7,8,9,10, and 11) from the Division of Occupational Licensing, which shows none of the J.V. partners were licensed individually or jointly. It also states that "According to the provision of AS 08.18.051(a), any work done under contractor registration number 10699 must be bid and worked under the entity R. S. Construction." (Emphasis added).

We believe sufficient evidence existed to support a citation to the three entities identified in the J.V. for violation of AS 08.18.011(a), for working as a contractor without being registered. In fact, this must have been the conclusion of the Department of Labor, Wage and Hour Division, as citations were issued on December 17, 1987, (attachment #12 and 13), but were never delivered.

April 13, 1988
Page 3

The J.V. was not only allowed to bid and be awarded a contract as an unlicensed entity, but after an investigation brought all of this to light, and to the J.V.'s attention, they were allowed to substitute a name change on the license application to bring the J.V. into compliance. This all took place on February 2, 1988, (attachment #14), long after contract award, and in fact, long after work had commenced on the contract, in apparent violation of the law.

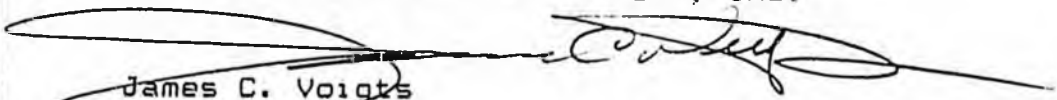
As stated in Mr. Randall Burns letter (attachment #5) "...our concern here is not simply for the bureaucratic niceties of a proper "paper" registration. Rather, our concern is generated by the negative consequences to public safety and welfare which can ensue when construction contractors are either not registered or not properly registered. As you are aware, a requirement of contractor registration is the filing of both a surety bond and evidence of proper insurance." When this fact was uncovered by enough entities, the DOT&PF allowed a name change to cause a retroactive correction instead of cancelling the contract, as we believe it should have happened.

We feel the DOT&PF acted in bad faith (attachment #15) in allowing this unlicensed entity to receive a contract award. All other licensed contractors are seriously prejudiced in their ability to compete if these types of activities are allowed to occur with the DOT&PF's blessings. It is our opinion this contract should not have been awarded in the first place, for reasons as pointed out in this letter, as well as our letter of April 4, 1988. But as the contract has been awarded, we now feel it would be prudent to cancel the contract and have it issued for a rebid. We also strongly urge you to pass Senate Bill 424 so as to preclude this scenario from happening in the future.

Our support is greatly appreciated. As more facts come to light in this issue, we will forward them to you.

Sincerely,

UTILITY CONTRACTORS OF ALASKA, INC.



James C. Voigts
President

cc: Attorney Grace Berg Schaible
DOT&PF Commissioner Mark S. Hickey
DOT&PF Bob Venusti, Chief of Technical Services
Bill Reeves, Associated General Contractors

JCV/bks

TO: Dennis Bowden
Licencing Enforcement
3301 Eagle Street, Suite 301
Anchorage, AK 99510

DATE: December 2, 1987

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: Kotzebue Airport
Improvements
Project No. 60434

FROM: Robert R. Venusti
Chief, Technical Services
Northern Region

As per your phone request enclosed is a copy of DOT&PF Standard Highway Specification Section 102-1.01 and DOT&PF Aviation General Contract Provision 20-01.

Please note that a contract was awarded to Kotzebue/KIC/RS Store Inc. JV on October 22, 1987 based on our determination that RS Store Inc. is a valid licenced contractor. In making this determination we took into account several documents including RS Store Inc's "Initial Registration" application to the Division of Occupational Licencing which indicates that the "Actual name of construction firm" is RS Store Inc. (copy attached). We also take into account the fact that RS Store Inc. has performed subcontract work for DOT&PF under its existing licence.

hm

xc: Monty Jordan
Chuck Coyle



LAW OFFICES

Mark R. Moderow

680 "V" STREET, SUITE 203
ANCHORAGE, ALASKA 99501
TELECOPIER (907) 278-7321
TELEPHONE (907) 277-5955

JERALD M. REICHLIN
ASSOCIATE

October 13, 1987

Robert R. Venusti
Chief, Technical Services
Department of Transportation &
Public Facilities
Northern Region
2301 Fager Road
Fairbanks, AK 99709-6394

RE: Kotzebue/K.I.C./R&S Stores, Inc., J.V.

Dear Mr. Venusti:

This is to provide an explanation with respect to the contractor's license held in the name of R.S. Construction. The name R.S. Construction is more a result of scrivener's error than anything else. The application was incorrectly filled out and all operations under the license have been carried out by R.S. Stores, Inc. R.S. Construction has always been regarded as a d/b/a of R.S. Stores. All payroll, equipment and contracting utilizing the R.S. Construction license has been carried out by R.S. Stores. There is no separate entity, the only place R.S. Construction exists is on the contractor's license.

Since R.S. Construction is a registered and licensed contractor, there has been substantial compliance with A.S. 08.18.151. The parties have been afforded the effective protection of the statute, Alaska Protection Service v. Frontier Color Cable, 680 P.2d 1119 (Alaska 1984).

Sincerely,

LAW OFFICES OF MARK R. MODEROW

Jerald M. Reichlin
Jerald M. Reichlin

JMR/lhc

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Northern Region	

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Northern Region

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Technical Services

from asserting the illegality because of his participation of the general rule applies to the failure of a party to a contractor's license.¹⁶ An authority that a contract may be some questionable tacit promise that Shivers Northwind's bond, has a pathway in reported where the owner's fore-contractor's lack of liability with a specific promise the statute and a representative owner had a license

which he would consider to inure to the benefit of the contractor under joint venture or partnership theory, the Supreme Court of Nevada held a cause of action on the contract to be barred by the assertion of the licensing statute.¹⁷

[8] Statutes which cause forfeitures are not favored. Where a bar to legal action is not mandated we approach the case from our own view of intelligent policy and with the thought of doing justice between the parties.¹⁸ Here, however, the legislature chose the closing of the doors of the courts as a fundamental tool to enforce its policy of ensuring competence and financial responsibility in those who undertake work as contractors. We are bound to enforce the legislative policies as we find them expressed in AS 08.18.011 et seq. Anyone engaged in building trades must be charged with awareness of the pervasive system of licenses and permits designed to enhance the public safety and confidence in the industry. Engrafting equitable exceptions onto the enforcement policy at best aids the ignorant and gullible, whom the legislature sought to regulate, and at worst creates fertile fields for the growth of sharp practice. We believe that the legislature favored the view of the California Supreme Court that:

Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties

are less likely to enter an illegal arrangement in the first place.¹⁹

Taking the facts, as we must, in the light most favorable to the plaintiff, we find that Sumner Development Corporation's knowledge of Shivers' lack of bond and registration, its suggestion that Shivers could shelter under the bond and registration of Northwind, and the participation of its principle officer in a company previously designed for the purpose of providing a bond and registration for Shivers do not create an estoppel against Sumner to assert the defense of AS 08.18.151.

[9] We further reject the notion that Shivers can claim compliance with the licensing statutes by "sheltering" under the license and bond of another company. Such a theory disregards basic principles of suretyship²⁰ and undermines the licensing statutes.²¹ Especially where the formation of a legitimate joint venture, one member of which is licensed, satisfies the statute, "sheltering" is unreasonable. Shivers has not argued that a joint venture or partnership of a nature that satisfies the statute existed.

[10] We decline to consider the issue of whether respondent complied substantially with the licensing statutes. Respondent failed to argue the point below and raised it here based upon unverifiable assertions in his brief. Even if those assertions were considered to be true, they do

17. *Magill v. Lewis*, 74 Nev. 391, 333 P.2d 717, 718-719 (1958). The court in *Magill* did uphold an action based upon the same facts under a theory that the owner's inducement of the contractor to enter the illegal contract while planning to assert the statute to avoid payment constituted the tort of deceit. Deceit actions are beyond the purview of licensing statutes. We approve of the holding in *Magill*, but in the instant case neither the complaint nor the motion before the court upon motion for summary judgment disclose facts sufficient to constitute an action for deceit. Summary judgment entered in this case should not bar an action by Shivers if he can plead and prove deceit. See also *Pickens v. American Mortgage Exchange*, 209 Cal.App.2d 292, 74 Cal.Rptr.

788 (1960); *Grant v. Weatherholt*, 123 Cal. App.2d 34, 260 P.2d 185, 191 (1954).

18. *Gate v. Rivers Construction Co.*, 515 P.2d 1020, 1022 (Alaska 1973).

19. *Lewis & Queen v. N. M. Ball Sons*, 45 Cal.2d 141, 308 P.2d 713, 719 (1957).

20. 17 Am.Jur.2d [Contractor's Bonds § 6] 125; 50 Am.Jur. [Suretyship § 29] 821 Cf. 17 Am.Jur.2d [Contractor's Bonds § 8] 196, 197; AS 04.18.071(a).

21. *Cooper v. Johnston*, 283 Ala. 585, 219 So. 2d 302, 307-308 (1968). See *Power City Communications, Inc. v. Calaveras Tel. Co.*, 250 F.Supp. 806, 514 (E.D.Cal.1969).

Cal.2d 267, 339 P.2d 851, of car does not estop buyer of car from asserting illegality of sale contract); 3 Cal.App.2d 397, 97 Cal. App.2d 397 (heirs to estate not bound by rule against privity for sale of expectancy before death of testatrix had gone into possession and incurred great expense incurred great expense incurred Milton Frank Allen Publishing Co. v. Petroleum Co., 89 Idaho 80, 403 P.2d 518, 162 S.E.2d 724, 730 2. publications and membership over 20 years does not Whitney v. Continental Co., 89 Idaho 80, 403 P.2d 518, 162 S.E.2d 724, 730 1. Kaiser v. Thomson, 55 Cal.2d 142, 144 (1957), see P. Agency, Inc. v. I. T. T. of New York, 70 N.Y.2d 175, 760 (Spec. Term pay illegal bonus to agents business); Somerset v. 124, 104 S.E.2d 344, 347 (overstated not to constitute stoppage); Farha v. Elam, 37 Ct.Civ.App.Tex.1964) profits of unlicensed architect); Cooper v. Baer, 50 P.2d 871, 872 (1962) (one to arrange illegal poker to assert illegality despite contention that game was governmental).

on, 55 N.M. 270, 232 P.2d 1); Murphy v. Campbell 1) Wash.2d 417, 480 P.2d

69 Wash.2d 763, 370 P.2d

ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF OCCUPATIONAL LICENSING

100⁰⁰ ✓
Mr

Application for: <input type="checkbox"/> Initial Registration <input checked="" type="checkbox"/> Renewal	Current License No AA- <u>0699</u>	Type of Contracting: If specialty, what type? <input checked="" type="checkbox"/> General <input type="checkbox"/> Specialty
------------------------------------------------------------------------------------------------------------------	------------------------------------	------------------------------------------------------------------------------------------------------------------------------------

Name of Electrical Administrator if engaging in electrical work.

Actual name of construction firm. If corporation, give corporation name.
R.S. Store Inc.

Actual name of person which the business will be conducted in Alaska.
R.S. Construction

Federal I.D. No. of Employer <u>92 0038806</u>	Business Phone <u>907 442 3123</u>	Contact Phone <u>442 3653</u>
---------------------------------------------------	---------------------------------------	----------------------------------

Physical Address: <u>500 Front St.</u>	Mailing Address: <u>Kotzebue Alaska Box 53</u>
City State Zip Code <u>KOTZEBUE Alaska 99726</u>	City State Zip Code <u>KOTZEBUE Alaska 99726</u>

TYPE OF ORGANIZATION: Check applicable box and provide complete names, addresses and social security numbers of owners, partners or officers, whichever is appropriate.
 Proprietorship Partnership Corporation

Name	Mailing Address	City	State
<u>Clara R. Salinas</u> 537 34 5296	<u>Box 53 Kotzebue</u>		<u>Alaska</u>
<u>Seymour R. Salinas</u> 574 14 6400	<u>Box 53</u>	<u>Kotzebue</u>	<u>Alaska</u>
<u>Sally R. Callahan</u> 574 14 3927	<u>Box 53</u>	<u>Kotzebue</u>	<u>Alaska</u>

I hereby certify that the above information is true and complete to the best of my knowledge. I understand that any false or misleading information may result in failure to obtain registration or subsequent revocation of my registration.

Signature of Applicant

Title

SUBSCRIBED AND SWORN before me this 11 day of July, 1982
 My Commission Expires



NOTARY PUBLIC

In reliance upon the truth and accuracy of the above statements, the Department will issue a Contractor's Registration provided the other requirements of AS 08.18 have been met. Mail this application along with check and supporting documents to: Construction Contractor's Section, Pouch D, Juneau, Alaska 99811.

YOUR APPLICATION AND SUPPORTING DOCUMENT WILL BE RETURNED IF THEY ARE NOT COMPLETE.
 ALL CERTIFICATES OF REGISTRATION EXPIRE JUNE 30th REGARDLESS OF WHEN ISSUED.

Department Use Only

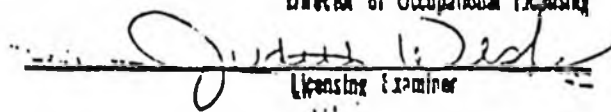
Date	Amount of Fee	Receipt No.	Registration No.	Expiration Date
<u>7/7/82</u>	<u>400</u>	<u>26707</u>		<u>6/30/87</u>

State of Alaska
Department of Commerce & Economic Development
Division of Occupational Licensing

I, the undersigned, certify that this is a true and full copy of the original document on file in the Division of Occupational Licensing, Juneau, Alaska.

Witness my hand this 4 day of April, 1986

Director of Occupational Licensing


Licensing Examiner

Board: _____
 License No.: _____
 Name: _____
 Address: _____
 Business Address: _____
 Phone No.: _____

NAME ADDRESS CHANGE

Additional documentation and a fee may be required, in accordance with applicable statutes & regulations.

STATE OF ALASKA
 Department of Commerce & Economic Development
 Division of Occupational Licensing

THIS CERTIFIES THAT
P. S. CONSTRUCTION
 IS A LICENSED GENERAL CONTRACTOR

License Number A 10679	Effective 1/1/87	Expiration 12/31/88
Board Designation 92-0038806	Date of Birth	
Height	Weight	Sex
Age	Eye	Hair

Control No. **28055**

Social Security No. 92-0038806	
Original Issue Date	Issued By LJS

Signature of Licensee

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

Division of Occupational Licensing

P.O. Box D-LIC, Juneau, Alaska 99801-0000

CONSTRUCTION CONTRACTORS

This certifies that, as provided by law, the person named is a licensed GENERAL CONTRACTOR

License No. A 10679	Issue Date 1/1/87	Expiration Date 12/31/88
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P. S. CONSTRUCTION
 P.O. BOX 1010
 KOTZEBUE, AK

STATE OF ALASKA
 Department of Commerce & Economic Development
 Division of Occupational Licensing

I, the undersigned, certify that this is a true and full and correct document on file in the Division of Occupational Licensing, Juneau, Alaska.

LORIAN M. LOUGHEE Witness my hand this _____ day of _____

Commissioner
 Department of Commerce & Economic Development

Director of Occupational Licensing

08-2407 (Rev 8/84)

Control No. **28055**

State of Alaska
Department of Commerce and Economic Development
Division of Occupational Licensing
Construction Contractor's Section

CERTIFICATE OF INSURANCE COVERAGE REQUIRED BY
THE CONTRACTORS' REGISTRATION ACT, AS 08.18

This is to certify that we are a duly authorized casualty insurer admitted to write business in the State of Alaska and have written a public liability policy of not less than the limits required under AS 08.18 on behalf of R.S. STORE, INC.

DBA: R.S. CONSTRUCTION

for registration as a construction contractor, under policy numbers 1CC090496252
effective from May 21, 1987 to May 21, 1988

in the event the above policy is cancelled for any reason, we agree to furnish the Department of Commerce and Economic Development, Construction Contractors' Section at the above address, a NOTIFICATION OF CANCELLATION at least THIRTY (30) days prior to the effective date of such cancellation.

United States Fidelity & Guaranty Co.

Name of Insurance Carrier
100 West Harrison Plaza
Seattle, WA 98119

Address



Signature of Authorized Agent
Ronald L. Perrault

05/06/87

Date

NOTE: Please print or type all blank spaces except for required signatures.

NOTE: This form or a certificate of good standing from your insurance company, similar to this form must be attached to the renewal form.

NOTE TO INSURANCE AGENCY: Do not send this form directly to the Division of Occupational Licensing. This form must be attached to the renewal application.

Note: The DBA name on the insurance form must match the DBA registered name exactly.

STATE OF ALASKA
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

MAR 8 1987

DIVISION OF
OCCUPATIONAL LICENSING

January 7, 1988

Mr. Jerald M. Reichlin
Associate
Law Offices of
Mark Moderow
880 "H" Street, Suite 203
Anchorage, AK 99501

L.S. S.
ANCHORAGE

JAN 13 1988

Dear Mr. Reichlin:

I am writing regarding the joint venture created by the City of Kotzebue, the Kikiktaguk Inupiat Corporation, and P. S. Stores, Incorporated (hereinafter the "Kotz/KIC/PS J.V.") to bid on the Kotzebue Airport Improvements project. As you are no doubt somewhat aware, the Departments of Labor and Commerce and Economic Development have had -- and continue to have -- serious doubts regarding the validity of the contract awarded to the Kotz/KIC PS J.V. I am writing to fully apprise your client(s) of our concerns and to require certain actions and evidence from P. S. Stores, Inc. and the joint venture in order to assure us of the joint venture's compliance with construction contractor statutes and regulations (48 C.S. 18.011 - 171 and 12 AAC 21.010 - 300).

First, there is the matter of P. S. Stores, Inc. and the name under which that corporation is registered as a contractor with the State of Alaska (i.e., R. S. Construction). You responded in mid-October of last year to Mr. Venusti of the Department of Transportation and Public Facilities (DOT/PA) regarding your client's position on the registration error. However, it is more than interesting to us that your client failed to respond to two separate letters from the Department of Labor in late 1986 and early 1987 on the same subject (copies enclosed).

The November 18, 1986 letter was sent in time for P. S. Stores Inc. to properly register itself with the Department of Commerce and Economic Development under the name P. S. Stores, Inc. (rather than the listed R. S. Construction) during the registration renewal period in December of 1986. This certified letter from Labor was received but never responded to or acted upon by P. S. Stores. Thus, in January of 1987, a second letter was sent, again requesting compliance. In response, in the form of a corrected name change for stores' contractor registration, was received by the Division of Occupational Licensing in the Department of Commerce and Economic Development. The failure to

January 7, 1988

respond to the letters left us with the assumption that R. S. Stores, Inc. would be operating under and placing bids in the name of R. S. Construction. AS 09.18.051 is very clear that "(e)xcept as provided otherwise by law, a person who has registered under one name as required by this chapter may not act in the capacity of a contractor under any other name unless that name also is registered." (Emphasis added.).

Naturally, following the failure to correct the registration identification, we were hard put not to view the creation of the joint venture formed with R. S. Stores, Inc. as either a direct refusal to comply with the contracting registration statutes (despite labor's attempts to enforce compliance) or as a joint venture not registered with the Department of Commerce because none of the entities forming this joint venture were registered in a name which was registered. AS 08.18.011(a) reads:

A person may not submit a bid or work as a contractor until that person has been issued a certificate of registration by the Department of Commerce and Economic Development. A partnership or joint venture shall be considered registered if one of the general partners or venturers whose name appears in the name under which the partnership or venture does business is registered. (Emphasis added.)

While you may believe, as your October letter stated, that this matter was "more a result of scrivener's error than anything else," we find R. S. Stores' failure to respond to the Department of Labor's certified requests more than "scrivener's error." After twice receiving notice of the registration problem and its potential consequences, perhaps you can appreciate our concern for the validity of the contract award made by DCI/PE to the Kutz/KIC/RS J.V.

Please do not misunderstand: our concern here is not simply for the bureaucratic niceties of a proper "trader" registration. Rather, our concern is generated by the negative consequences to public safety and welfare which can ensue when construction contractors are either not registered or not properly registered. As you are aware, a requirement of contractor registration is the filing of both a surety bond and evidence of proper insurance. The bond is conditioned upon the contractor's promise to 1) pay all taxes, 2) pay all persons furnishing labor or materials or renting or supplying equipment to the contractor, and 3) pay all amounts that may be adjudged against the contractor for negligent or improper work or breach of contract or for damage to public facilities in the conduct or course of the contracting business or project (see AS 09.18.071). Claims against a contractor bond may be brought in court and, in accordance with

January 7, 1988

AS 08.18.081 and applicable regulations, shall be satisfied after reduction to judgment. Evidence of insurance must also be supplied, indicating the contractor has public liability and property damage insurance in effect.

The clear purpose of the bonding and insurance requirements is to afford some measure of protection to the public against the improper actions of a contractor. Our very real concern in this instant case is that the confusion over the status of R. S. Stores' registration has left the public unprotected. The Department of Commerce and Economic Development, whose responsibility it is to verify and (along with the Department of Labor) enforce the statutorily required level of bonding and insurance, must have some assurances from the joint venture that the public is, indeed, properly protected.

Therefore, the following is required by the Division of Occupational Licensing:

- 1) R. S. Stores, Inc., if it intends to be a registered contractor, must submit a name change in accordance with 12 AAC 21.040, listing R. S. Stores, Inc. as the registered contractor name and deleting any reference to R. S. Construction, as well as update its registration to indicate the current officers of the corporation.
- 2) In accordance with 12 AAC 21.040, a properly executed rider to the bond on file must be submitted, deleting any reference to R. S. Construction.
- 3) R. S. Stores, Inc. must file evidence that only R. S. Stores, Inc. is covered by the insurance required of AS 08.18.071. Any reference to R. S. Construction must be removed from the insurance documents.
- 4) Kotzebue/KIC/AS J.V. must provide written evidence that the bonding and insurance for R. S. Stores, Inc. extends to cover the work of the joint venture. If the bond and insurance for R. S. Stores, Inc. will not extend to cover the conduct of the contracting business by the joint venture, then a new bond or cash deposit or other negotiable security; see AS 08.18.071(b) and applicable regulations; and evidence of insurance must be filed with the Department of Commerce and Economic Development covering the performance of the joint venture.

January 7, 1988


Our goal here is full compliance. Article 3 of Chapter 18 of Title 8, entitled "Enforcement," makes it clear that the actions of your client, to date, are grounds for suspension of the activities of the Kotz/KIC/RS J.V. The failure to meet the requirements of AS 08.18.051 are serious and, alone, jeopardizes the status of the Kotzebue construction project. Even more important, however, are our concerns for the confusion over whether both R. S. Stores, Inc. and the joint venture are properly bonded and insured.

Please provide the Division of Occupational Licensing with the necessary paperwork and documentation to accomplish the four points outlined above as soon as possible, but not later than February 1, 1988.

Should you have any questions regarding this matter, please do not hesitate to contact me at 465-2535 in Juneau. Also, give my best to Mark. I haven't seen him since my days at the Bar Association.

Sincerely,

Pandall P. Burns
Director



RPR/sa3765s
10788a

Enclosures

cc: Tom Stuart, Director, Division of Labor Standards and Safety,
Department of Labor
Lawrence Delay, Assistant Attorney General
Jan DeYoung, Assistant Attorney General
Kris Miller, Licensing Examiner, Contractor Section,
Division of Occupational Licensing

C. kris

Before

Certified Mail No. 234 019 529
November 18, 1986
Dictated 11/10/86

R.S. Store, Inc.
P.O. Box 1010
Kotzebue, AK 99752

Attention: Biff Harralson

RE: Kotzebue Armory

Dear Mr. Harralson:

Several months ago you were contacted by Department of Labor Investigator Elizabeth Johnson concerning certified payrolls that were submitted to the Department from R.S. Store, Inc. listing the contractor's license as A-10699. A routine check of this number revealed A10699 is registered to R.S. Construction, a general contractor. Ms. Johnson advised you that AS OR.18.031 stated:

IDENTIFICATION REQUIREMENTS. (a) Except as provided otherwise by law, a person who has registered under one name as required by this chapter may not act in the capacity of a contractor under any other name unless that name is also registered.

(b) All advertising, contracts, correspondence, cards, signs, posters, papers and documents prepared by a contractor for the contracting business shall show the contractor's name, mailing address of the contractor's principal place of business. Advertising and contracts shall also include the contractor's registration number.

(c) Individual contractors and partners, associates, agents, salesmen, solicitors, officers and employees of contractors shall use their true name and addresses and the true name of the contractor firm at all times while acting in the capacity of a contractor or performing related activities.

Review of certified payrolls submitted by your company indicate that all payrolls have been submitted as R.S. Store, Inc., a name which is not registered. This is a continued violation of AS OR.18.031. Further violations of this statute will result in the Department of Labor issuing a criminal citation to R.S. Construction.

Issuing this citation requires that the prime contractor, Gorskunh Construction Inc. and Associates, also be issued a criminal citation for allowing your comp.

Page 1
R.S. Stone, Inc.
November 18, 1986

to work while in an unregistered status. Any certified payrolls submitted by your company under an unregistered name after receipt of this certified notice will result in issuance of a citation.

Further questions regarding contractor's licensing statutes may be directed to Dennis Bowden, Contractor Licensing Investigator, at 451-8756.

It has also come to our attention your payrolls do not include your employees working as culinary workers on the Kotzebue Armory/ONS Project. According to correspondence from Department of Transportation and Public Facilities dated 6/27/86, your company was approved as a subcontractor to provide camp and catering services. If a public works subcontractor furnishes living and/or eating facilities to its employees, the culinary employees providing these services are entitled to prevailing wage. We will expect to receive amended certified payrolls listing the employees who perform culinary work. Any future payrolls submitted must include these workers.

We have enclosed for your convenience a copy of Wage & Hour Administration pamphlet no. 600, Labor and Mechanics Minimum Rates of Pay, effective November 2, 1986. If you have any questions regarding applicable rates or other requirements of Title 36 Statutes please contact me at 451-3060.

Sincerely,

Konte L. Jordan
Wage & Hour Investigator
Fairbanks

jlw

cc: Elizabeth Johnson, W/H Investigator, Anchorage
Goravich Construction, Inc. and Associates, 6230 Tuttle Place, #3, Anchorage,
AK 99507
Kent Farney, Department of Transportation and Public Facilities, 2301 Pagar
Road, Fairbanks, AK 99701
Dave McCaleb, Construction Chief, DOT/PF

After
Certified Mail No. 294 019 651
January 22, 1987

RS Store, Inc./ RS Construction
P.O. Box 1010
Kotzebue, AK 99752

Attention: Biff Harrison

RE: KOTZEBUE ARMOY

Dear Mr. Harrison:

On November 18, 1986 we sent certified correspondence to you regarding your company's work on the above project. This correspondence was signed for on November 24, 1986. In that correspondence we advised you of a possible violation of 08.18.051 if you continued to do business as a contractor using the company name of RS Store, Inc. as that entity is not registered as a licensed contractor. We received a payroll for week ending November 08, 1986 marked final. Since that time we have not received further payrolls from your company as either RS Store, Inc. or RS Construction. Therefore, we assume that you are not presently working as a contractor and/or are operating as RS Construction.

In our November 18, 1986 correspondence we also requested amended certified payrolls to include your employees who worked as culinary workers on the Kotzebue ArmoY project. To date we have not received certified payrolls for these employees. If you do not respond to this request by January 30, 1987, it will be necessary for the Department to direct the Department of Transportation and Public Facilities withhold funds until we can verify through audit that AS 36.05.010 has been met.

If you have further questions please contact me at 452-3060.

Sincerely,

Monte L. Jordan
Vaga A Hour Investigator
Fairbanks

Jlr

cc: Corauch Construction, Inc. and Associates, 6250 Tuttle Place #3, Anchorage, AK 99507
Five McCaleb, Construction Chief, Department of Transportation/PT, 2301 Regar Road, Fairbanks 99701

Sec. 08.18.010. [Repealed, § 1 ch 100 SLA 1968.]

Sec. 08.18.011. Registration required. (a) A person may not submit a bid or work as a contractor until that person has been issued a certificate of registration by the Department of Commerce and Economic Development. A partnership or joint venture shall be considered registered if one of the general partners or venturers whose name appears in the name under which the partnership or venture does business is registered.

(b) A general contractor may not allow a person required to be registered under this chapter to work for the general contractor as a specialty contractor unless the person is registered under this chapter. (§ 2 ch 100 SLA 1968; am § 1 ch 83 SLA 1985)

Effect of amendments. — The 1985 amendment added subsection (b).

NOTES TO DECISIONS

Use of registered name not required. — While a joint venture is not required to hold itself out to the public at large under a registered name in order to be doing business in that name, it must at least use that name in its dealings with the contracting party and in its business dealings with others against whom it may later seek to bring claims. *Fomby v. Whisenhunt*, Sup. Ct. Op. No. 2801 (File No. 7434), 680 P.2d 787 (1984).

Satisfying AS 08.18.051 is not prerequisite. — No specific language makes satisfaction of AS 08.18.051 a prerequisite to a finding that this section is satisfied. *Fomby v. Whisenhunt*, Sup. Ct. Op. No. 2801 (File No. 7434), 680 P.2d 787 (1984).

Substantial compliance abrogates bar of AS 08.18.151. — The statutory bar of AS 08.18.151 may be abrogated by a general contractor's substantial compliance with this section. *Jones v. Short*, Sup. Ct. Op. No. 2916 (File No. S-220), 696 P.2d 665 (1985).

Substantial compliance with chapter not shown. — Where a subcontractor was neither registered nor bonded until

the day before it completed work, it did not substantially comply with this chapter. *Lost Valley Timber, Inc. v. Power City Constr., Inc.*, 809 F.2d 590 (9th Cir. 1987).

Anyone engaged in building trades must be charged with awareness of the pervasive system of licenses and permits designed to enhance the public safety and confidence in the industry. *Sumner Dev. Corp. v. Shivers*, Sup. Ct. Op. No. 984 (File No. 2036), 517 P.2d 757 (1974).

Applied in *Gross v. Bayshore Land Co.*, Sup. Ct. Op. No. 3002 (Files Nos. S-711, S-713), 710 P.2d 1007 (1985).

Quoted in *State ex rel. Smith v. Tyonek Timber, Inc.*, Sup. Ct. Op. No. 2813 (File Nos. 7170, 7256), 680 P.2d 1148 (1984).

Cited in *Industrial Power & Lighting Corp. v. Western Modular Corp.*, Sup. Ct. Op. No. 2259 (File Nos. 4163, 4176), 623 P.2d 291 (1981); *Alaska Protection Servs., Inc. v. Frontier Colorcable, Inc.*, Sup. Ct. Op. No. 2800 (File Nos. 7562, 7609), 680 P.2d 1119 (1984).

Collateral references. — Contractor's failure to procure license or permit as af-

fecting enforceability of contract or right of recovery for work done. 44 ALR4th 271.

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

ATTACHMENT #7
STEVE COWPER, GOVERNOR

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

ATTESTATION OF OFFICIAL RECORD

This is to certify that I, Kristina K. Miller, Licensing Examiner for the Department of Commerce and Economic Development, Division of Occupational Licensing, have examined records of this department which are in my custody and have found that in reference to construction registration number AA 10699, associated with R. S. Construction, the registered entity to be R. S. Construction and the listed owner to be R. S. Store, Inc. The insured and bonded entity is dba (doing business as) R. S. Construction. The registration, dated May 4, 1982 reflects the dba name to be R. S. Construction. The registration has been renewed on July 17, 1983, April 2, 1984, January 30, 1985, and January 1, 1987 as dba R. S. Construction. According to the provisions of AS 08.18.051(a), any work done under contractor registration number AA 10699 must be bid and worked under the registered entity name of R. S. Construction.

DATED this 3rd day of December, 1987, at Juneau, Alaska.

Kristina K. Miller
Division of Occupational Licensing
Department of Commerce and
Economic Development
State of Alaska

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 1987, at Juneau, Alaska.

Dorinda Park-Lippert
My commission expires: 9/23/90

I, J. Anthony Smith, Commissioner, Department of Commerce and Economic Development, do hereby certify that Kristina K. Miller, who at the time of signing this attestation was the Licensing Examiner acting in an official capacity for the records of Construction Contractor Registration in the Division of Occupational Licensing in lawful custody of the records referred to, and that said records are kept in Juneau, Alaska in the First Judicial District. I further certify that the above signature of Kristina K. Miller is genuine.

Witness my hand and the seal of my office at Juneau, Alaska, this 3rd day of

December, 1987.



J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

ATTESTATION OF OFFICIAL RECORD

ATTACHMENT #8
STEVE COWPER, GOVERNOR

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

This is to certify that I, Kristina K. Miller, Licensing Examiner for the Department of Commerce and Economic Development, Division of Occupational Licensing, have examined records of this department which are in my custody and have found that there is no record of registration as a construction contractor in the State of Alaska for "R & S Store, Inc."

DATED this 2nd day of December, 1987, at Juneau, Alaska.

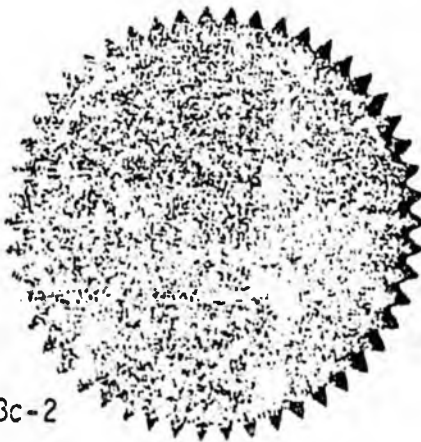
Kristina K. Miller
Division of Occupational Licensing
Department of Commerce and
Economic Development
State of Alaska

SUBSCRIBED AND SWORN TO before me this 2 day of December, 1987, at Juneau, Alaska.

Patricia Park - Fisher
My commission expires: 9/23/90

I, J. Anthony Smith, Commissioner, Department of Commerce and Economic Development, do hereby certify that Kristina K. Miller, who at the time of signing this attestation was the Licensing Examiner acting in an official capacity for the records of Construction Contractor Registration in the Division of Occupational Licensing in lawful custody of the records referred to, and that said records are kept in Juneau, Alaska in the First Judicial District. I further certify that the above signature of Kristina K. Miller is genuine.

Witness my hand and the seal of my office at Juneau, Alaska, this 2nd day of December, 1987.



J. Anthony Smith
J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development

KKM/cw6763c-2
12287a

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

STEVE COWPER, GOVERNOR

ATTACHMENT #9

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

ATTESTATION OF OFFICIAL RECORD

This is to certify that I, Kristina K. Miller, Licensing Examiner for the Department of Commerce and Economic Development, Division of Occupational Licensing, have examined records of this department which are in my custody and have found that there is no record of registration as a construction contractor in the State of Alaska for "Kikiktagruk Inupiat Corporation."

DATED this 2nd day of December, 1987, at Juneau, Alaska.

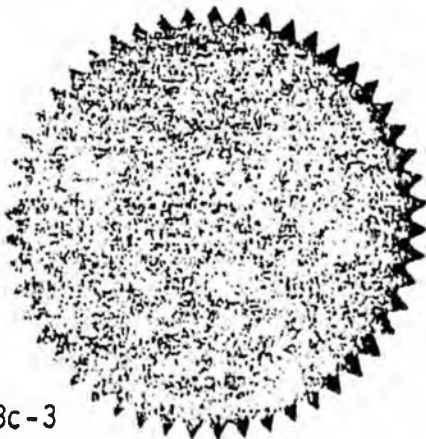
Kristina K. Miller
Division of Occupational Licensing
Department of Commerce and
Economic Development
State of Alaska

SUBSCRIBED AND SWORN TO before me this 2 day of December, 1987
at Juneau, Alaska.

Patricia Parks-Lisby
My commission expires: 9/23/90

I, J. Anthony Smith, Commissioner, Department of Commerce and Economic Development, do hereby certify that Kristina K. Miller, who at the time of signing this attestation was the Licensing Examiner acting in an official capacity for the records of Construction Contractor Registration in the Division of Occupational Licensing in lawful custody of the records referred to, and that said records are kept in Juneau, Alaska in the First Judicial District. I further certify that the above signature of Kristina K. Miller is genuine.

Witness my hand and the seal of my office at Juneau, Alaska, this 2nd day of
December, 1987.



J. Anthony Smith
J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development

KKM/cw6763c-3

08-HBLH 12287a

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

ATTACHMENT #10
STEVE COWPER, GOVERNOR

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

ATTESTATION OF OFFICIAL RECORD

This is to certify that I, Kristina K. Miller, Licensing Examiner for the Department of Commerce and Economic Development, Division of Occupational Licensing, have examined records of this department which are in my custody and have found that there is no record of registration as a construction contractor in the State of Alaska for "City of Kotzebue."

DATED this 2nd day of December, 1987, at Juneau, Alaska.

Kristina K. Miller

Division of Occupational Licensing
Department of Commerce and
Economic Development
State of Alaska

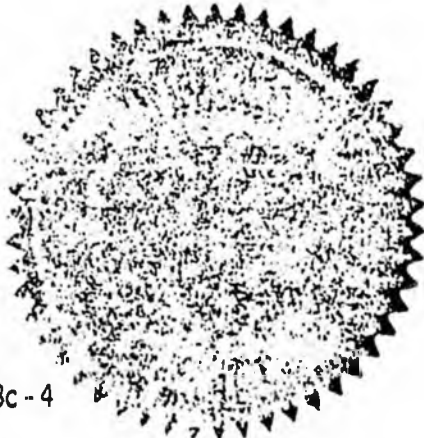
SUBSCRIBED AND SWORN TO before me this 2 day of December, 1987, at Juneau, Alaska.

Patricia Park-Lisak
My commission expires: 9/23/90

I, J. Anthony Smith, Commissioner, Department of Commerce and Economic Development, do hereby certify that Kristina K. Miller, who at the time of signing this attestation was the Licensing Examiner acting in an official capacity for the records of Construction Contractor Registration in the Division of Occupational Licensing in lawful custody of the records referred to, and that said records are kept in Juneau, Alaska in the First Judicial District. I further certify that the above signature of Kristina K. Miller is genuine.

Witness my hand and the seal of my office at Juneau, Alaska, this 2nd day of December, 1987.

J. Anthony Smith
J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development



STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

ATTACHMENT #11

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

DIVISION OF OCCUPATIONAL LICENSING

ATTESTATION OF OFFICIAL RECORD

This is to certify that I, Kristina K. Miller, Licensing Examiner for the Department of Commerce and Economic Development, Division of Occupational Licensing, have examined records of this department which are in my custody and have found that there is no record of registration as a construction contractor in the State of Alaska for "Kotzebue/K.I.C./R & S Store, Inc., J.V."

DATED this 2nd day of December, 1987, at Juneau, Alaska.

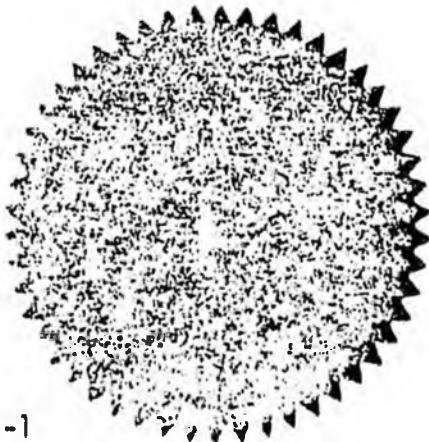
Kristina K. Miller
Division of Occupational Licensing
Department of Commerce and
Economic Development
State of Alaska

SUBSCRIBED AND SWORN TO before me this 2 day of December, 1987, at Juneau, Alaska.

Patricia Park-Lisher
My commission expires: 9/23/90

I, J. Anthony Smith, Commissioner, Department of Commerce and Economic Development, do hereby certify that Kristina K. Miller, who at the time of signing this attestation was the Licensing Examiner acting in an official capacity for the records of Construction Contractor Registration in the Division of Occupational Licensing in lawful custody of the records referred to, and that said records are kept in Juneau, Alaska in the First Judicial District. I further certify that the above signature of Kristina K. Miller is genuine.

Witness my hand and the seal of my office at Juneau, Alaska, this 2nd day of December, 1987.



J. Anthony Smith
J. Anthony Smith, Commissioner
Department of Commerce and
Economic Development

KKM/cw6763c-1

09-481-12287a

UNIFORM CITATION

Alaska State Department of Labor,
Division of Labor Standards
and Safety, Pouch 7-021
Anchorage, Alaska 99510

State of Alaska

Department of Labor
Plaintiff

No. OCL 50866

2ND

Judicial District

COMPLAINT AFFIDAVIT

In the DISTRICT COURT of Kotzebue, AK
the undersigned, being duly sworn, upon his oath deposes and says:

DURING The period 10/21/87 thru 11/8/87 AM
On the day of 10 1987 P.M.

NAME DEFENDANT B. S. Stores, INC.
Last (Please Print) First M.I.

STREET P. O. Box 53

CITY-STATE Kotzebue, AK H. Phone Time
W. Phone Time

AGE BIRTH DATE RACE SEX HT. WT.

DRIV. LIC. NO. Kind Number State

NEW LIC. NO. STATE YR.

MAKE STYLE COLOR

AT (Location) Kotzebue Airport

DID UNLAWFULLY IN THE JUDICIAL DISTRICT AND STATE AFORE-
SAID AND DID THEN AND THERE COMMIT THE FOLLOWING
OFFENSE:

In violation of Sec. 08.18.011 (A) DID
WORK AS A CONTRACTOR
WITHOUT BEING REGISTERED

NAME: Last First Middle

The undersigned further states that he has just and reasonable
grounds to believe, and does believe, that the person named
above committed the offense herein set forth, contrary to law.
SWORN AND SUBSCRIBED BEFORE ME

This day of 19

Name and Title (Signature of officer or
other complaint)

Court Appearance: 2ND day of Feb 1988 at 11:30 AM

(Arraignment) Address of Court: State Dist Court, Kotzebue, AK

Signature

THIS CITATION REQUIRES A
MANDATORY COURT APPEARANCE

COURT COPY

08 335 (7-85)

OCL 50866

IN THE (DISTRICT) (SUPERIOR) COURT FOR THE STATE OF ALASKA

ATTACHMENT #13

AT Kotzebue, AK

State of Alaska
Department of Labor
vs. Plaintiff,

Kikiktagruk Inupiat Corporation
Defendant.

CASE NO. OCL 50867

STATE TROOPER
DIRECTIONS FOR SERVICE

Atty Firm, CSED Officer, State Agency Department of Labor, Wage and Hour Division

Mail Address 3301 Eagle Street, Suite 301, PO Box 7-020, Anchorage 99510

Attorney or Representative Dennis R. Bowden Phone 264-2435

List of ALL Documents to be served Uniform citation #OCL 50867 and Xerox copy of same. Return all copies of citation except violator's copy (last) to above.

** Serve on Dennis J. Tienelman, Frank Stein, Cheryl Edenshaw, Clara Taylor, or Chuck Greene Date of Birth _____

SSN _____ ID/Driver's Lic. No. _____ State _____

Residence Address _____ City _____ Phone _____

Business Address P O Box 279 City Kotzebue, AK Phone _____

**Additional Directions Persons listed are identified in corporate records as registered agent and /or corporate officers for K.I.C. Service can be to K.I.C. only.

RETURN OF SERVICE

DEC 27 1987

I, the undersigned, hereby certify and return that I served the above listed documents, in the above captioned matter, by personally handing to and leaving a true and correct copy with:

[] the person named above;

[] _____ of the defendant, a person of suitable age and discretion who resides with the person named above;

at _____ (Address, street number, apt. (rural route) milepost, etc.)

in _____, Alaska, in the _____ Judicial District, on _____, 19____, at _____ .m.

Return Date _____ Arthur A. English, Commissioner
Department of Public Safety

Service Fee _____ By _____

Mileage _____ Printed Name _____

Total _____ Title _____

UNIFORM CITATION -

State of Alaska

Department of Labor

Plaintiff

Alaska State Department of Labor,
Division of Labor Standards
and Safety, Pouch 7-021
Anchorage, Alaska 99510

No. OCL 50867

2ND

Judicial District

COMPLAINT AFFIDAVIT

In the DISTRICT COURT of Kotzebue, AK
the undersigned, being duly sworn, upon his oath deposes and says:

On the 29th day of October 1987, at _____ A.M.
P.M.
NAME
DEPENDANT KIKITAGRUK INUPIAT CORPORATION

Last (Please Print) First M.I.

STREET Po. Box 279

CITY-STATE Kotzebue, AK H. Phone _____ Time _____
W. Phone _____ Time _____

AGE _____ BIRTH _____ RACE _____ SEX _____ HT. _____ WT. _____
DRIV. _____

LIC. NO. _____ Kind _____ Number _____ State _____

VEH. LIC. NO. _____ STATE _____ YR. _____

MAKE _____ STYLE _____ COLOR _____

AT (Location) Kotzebue Airport
DID UNLAWFULLY IN THE JUDICIAL DISTRICT AND STATE AFORE-
SAID AND DID THEN AND THERE COMMIT THE FOLLOWING
OFFENSE:

violation of Sec. 08.18.011(A) DID WORK
IS A CONTRACTOR WITHOUT
BEING REGISTERED.

NAME: _____
Last _____
First _____
Middle _____

The undersigned further states that he has just and reasonable
grounds to believe, and does believe, that the person named
above committed the offense herein set forth, contrary to law.
SWORN AND SUBSCRIBED BEFORE ME

This _____ day of _____ 19 _____

Name and Title _____ (Signature of officer or
other complaint)

Court Appearance: 2ND day of Feb 1988 at 1:30 P.M.
(Arrestment)
Address of Court: State Dist. Ct. Kotzebue, AK

Signature: _____

THIS CITATION REQUIRES A
MANDATORY COURT APPEARANCE
COURT COPY

OCL 50867

STATE OF ALASKA
Department of Commerce & Economic Development
Division of Occupational Licensing

I, the undersigned, certify that this is a true and full copy of the original document on file in the Division of Occupational Licensing, Juneau, Alaska.

Name Change Effective 2/2/88

Witness my hand this 4 day of April, 19 88 10699

Director of ~~Occupational Licensing~~ **Department Use Only**

State of Alaska
Department of Commerce and Economic Development
Division of Occupational Licensing
Construction Contractor's Section
P.O. Box D-LIC
Juneau, Alaska 99811-0800

OF ALASKA
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT
FEB 02 1988
DIVISION OF
OCCUPATIONAL LICENSING
Receipt Date

Please read information sheet before completing application.

- Application for:
 Initial Registration
 Name/Entity Change

Type of Contracting: If specialty, what trade(s)?

- General 1. _____
 Specialty 2. _____

Do NOT list SIC codes.

If previously licensed, please state license number A 10699

- Upgrade: license number _____
 Downgrade: license number _____

If engaging in electrical work, name of electrical administrator:

Name: _____ Categories _____

Name of Company: _____ License Number _____

The actual name under which you will be doing business in Alaska (dba):

R.S. Store, Inc.

Complete Mailing Address:

P.O. Box 1010

Kotzebue, AK 99752

City State Zip Code

Complete Physical Address:

606 Bison Street

Kotzebue, AK 99752

City State Zip Code

Business Phone: (907) 442-3653

Type of Organization: THIS SECTION MUST BE COMPLETED. Provide complete names, addresses and social security numbers of owners, partners or officers, whichever is appropriate.

- Proprietorship Partnership Corporation

Name Complete Mailing Address

1. Donald L. Gallahorn P.O. Box 909 Kotzebue, AK 99752

SS No. 574-26-2352

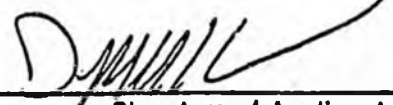
2. Yvonne Salinas P.O. Box 53 Kotzebue, AK 99752

SS No. 574-28-8271

3. Sally Gallahorn P.O. Box 83 Kotzebue, AK 99752

SS No. 574-14-3927

I hereby certify that the above information is true and complete to the best of my knowledge. I understand that any false or misleading information may result in failure to obtain registration or subsequent revocation of my registration.

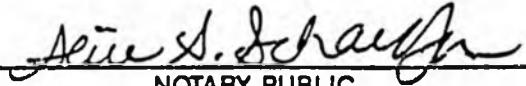


Signature of Applicant

Donald L. Gallahorn - President

Title

SUBSCRIBED AND SWORN to before me this 27th
day (of January) 19 88
My Commission expires 3/18/90



NOTARY PUBLIC

(Notary Seal)

YOUR APPLICATION WILL BE PROCESSED IN THE MOST EXPEDIENT MANNER ACCORDING TO THE DATE IT IS RECEIVED IN THIS OFFICE. PLEASE BE ADVISED THAT CONSTANT TELEPHONE INQUIRIES INTERRUPT THE APPLICATION PROCESS, AND SHOULD BE AVOIDED WHENEVER POSSIBLE. YOUR APPLICATION AND SUPPORTING DOCUMENTS WILL BE RETURNED IF THEY ARE NOT COMPLETE. ALL CERTIFICATES OF REGISTRATION EXPIRE DECEMBER 31 OF EVEN NUMBERED YEARS REGARDLESS OF DATE ISSUED.

Board: _____
 License No.: _____
 Name: _____
 Address: _____
 Business Address: _____
 Phone No.: _____

NAME / ADDRESS CHANGE

Additional documentation and a fee may be required, in accordance with applicable statutes & regulations.

STATE OF ALASKA
 Department of Commerce & Economic Development
 Division of Occupational Licensing

THIS CERTIFIES THAT
R S STORE, INC.
 IS A LICENSED **GENERAL CONTRACTOR**

License Number		Effective		Expiration	
A 10699		2/ 2/88		12/31/88	
Social Security Number			Date of Birth		
92-0038806					
Height	Weight	Sex	Eye	Hair	
				44379	

Signature

Control No: 44379

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

Division of Occupational Licensing

P.O. Box D-LIC, Juneau, Alaska 99811-0800

CONSTRUCTION CONTRACTORS

This certifies that, as provided by law, the person named is a licensed GENERAL CONTRACTOR

License No.	Effective Date	Expiration Date
A 10699	2/ 2/88	12/31/88

R S STORE, INC.
 P.O. BOX 1010
 KOTZEBUE , AK 99752

Social Security No.	
92-0038806	
Original Issue Date	Issued By
	JW

Signature of Licensee

J. ANTHONY SMITH

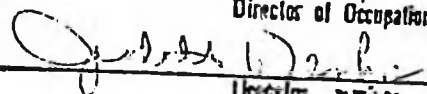
Commissioner
 Department of Commerce & Economic Development

08-2407 (Rev. 9/84)

Control No: 44379

STATE OF ALASKA
 Department of Commerce & Economic Development
 Division of Occupational Licensing

I, the undersigned, certify that this is a true and full copy of the original document on file in the Division of Occupational Licensing, Juneau, Alaska.

Witness my hand this 4 day of April, 1988
 Director of Occupational Licensing

 Licensee

unit" means the Department of Ad-
tracting agency of the state. (§ 2 ch

General Provisions.

- Section
- 920. Reporting of anticompetitive practices
- 930. Civil and criminal penalties
- 940. Enforcement
- 950. Severability
- 990. Definitions
- 995. Short title

§ 27, ch. 65, SLA 1987, provides that this
article takes effect January 1, 1988

of this chapter. (a) This chapter ap-
r entered into after January 1, 1988,
application to a contract solicited or

ery expenditure of state funds, in-
ng federal assistance except as other-
y the state, acting through an agency.
his chapter does not apply to

witnesses to provide for professional
to existing or probable lawsuits in
me a party;
y of Alaska where the work is to be
dents enrolled in the university;
ors and dentists;
real property or interest in real prop-
36.30.080;

tion of ballots under AS 15.15.030.
property and other contracts relating
, 02.15.090, and 02.15.091;
erty under AS 19.05.060;
material or equipment under AS

ers of services under AS 47.07;
47.24; AS 47.25.195, and 47.25.310

(12) contracts of the Department of Fish and Game for flights that
involve specialized flying and piloting skills and are not point-to-
point;

(13) purchases of income-producing assets for the state treasury or
a public corporation of the state.

(c) Except for AS 36.30.700 — 36.30.790, this chapter does not
apply to contracts between two or more agencies, the state and its
political subdivisions, or the state and other governments.

(d) Nothing in this chapter or in regulations adopted under this
chapter prevents an agency or political subdivision from complying
with the terms and conditions of a grant, gift, bequest, cooperative
agreement or federal assistance agreement.

(e) AS 36.30.170 applies to all insurance contracts involving state
money, including state grants and reimbursement to municipalities,
school districts, and other entities. (§ 2 ch 106 SLA 1986; am §§ 21,
22 ch 65 SLA 1987)

Effect of amendments. — The 1987 and, effective January 1, 1988, added sub-
amendment substituted "January 1, section (e).
1988" for "July 1, 1987" in subsection (a)

Sec. 36.30.860. Supplementary general principles of law ap-
plicable. Unless displaced by the particular provisions of this chap-
ter, the principles of law and equity, including the Uniform Commer-
cial Code (AS 45.01 — AS 45.09), the law merchant, and law relative
to capacity to contract, agency, fraud, misrepresentation, duress, coer-
cion, mistake, or bankruptcy shall supplement the provisions of this
chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.870. Adoption of regulations. (a) Regulations under
this chapter shall be adopted in accordance with the Administrative
Procedure Act (AS 44.62).

(b) Regulations under this chapter applicable to procurements of
construction or procurements for or disposal of property of the state
equipment fleet shall be adopted by the commissioner of administra-
tion only after consultation with the commissioner of transportation
and public facilities. (§ 2 ch 106 SLA 1986)

Sec. 36.30.880. Requirement of good faith. All parties involved
in the negotiation, performance, or administration of state contracts
shall act in good faith. (§ 2 ch 106 SLA 1986)



UTILITY CONTRACTORS OF ALASKA, INC.

Alaska Chapter of the National Utility Contractors Association

PO Box 112628 • Anchorage, Alaska 99511-2628 • (907) 349-4731

April 4, 1988

Arliss Sturgulewski
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Re: Senate Bill Number 424

Dear Senator:

We are sending this letter in support of Senate Bill Number 424 introduced in the Senate by Senators Jones and Fischer on February 28, 1988 (attachment #1). In doing so, we would like to point out some facts that we believe helped bring this bill into being.

Bids for the Kotzebue Airport Improvements, Project Number AIP 3-02-0160-04/60434, were opened September 15, 1987, by the Department of Transportation and Public Facilities (DOT&PF) in Fairbanks. The apparent low bid was submitted by a Joint Venture (JV) consisting of the City of Kotzebue (City), a municipal corporation, Kikitagrak Inupiat Corporation (K.I.C.), an Alaskan Corporation, and R. S. Store, Inc. (R.S.), an Alaskan Corporation.

On September 22, 1987, "Notice of Intent to Award" was sent out by the DOT&PF. To prevent what they believed to be an error in judgement by the DOT&PF, an Alaskan licensed Contractor and Corporation, and a bidder for this project, D & B General, Inc. (D & B), appealed this decision to the Superior Court on October 15, 1987, after exhausting all administrative appeals. They based their case, in part, on the following two statutes:

1) AS 29.35.250 which provides in pertinent part:
"(a) A city inside a borough may exercise any power not otherwise prohibited by law."

2) AS 37.10.085 which provides as follows:
Financial aid to corporations by state or political subdivisions. Neither the state nor a political subdivision of the state may:

1. make a subscription to the capital stock of a corporation;
2. lend its credit for the use of a corporation; or
3. borrow money for the use of a corporation."

Id. (Emphasis added)

April 4, 1988

Page 2

But, the court ruled against the plaintiff, D & B, finding that they had not offered any actual evidence establishing that the City of Kotzebue had "lent its credit for the use of a private corporation." Award was made by the DOT&PF the following day to the J.V. without any additional investigation to ascertain whether or not the City was lending its credit to the private J.V. partners.

Subsequent to this court action, D & B and the **Utility Contractors of Alaska** have learned through an article in the Arctic Sounder Newspaper of March 2, 1988, (Attachment #2), that the City of Kotzebue did, in fact, lend \$300,000.00 to R.S. Store, Inc., one of the J.V. partners, prior to the award of the contract and court action. This act was obviously in apparent violation of the aforementioned statutes.

To further add to their concern over this matter, D & B has only recently come to obtain a memo, from the Attorney General, Grace Schaible, dated April 7, 1987, which states very clearly that no contract should be awarded to a municipality (Attachment #3). Yet, D & B was forced to go to court and argue against the State's Assistant District Attorney General (not the J.V.) on this contract award **without** benefit of this memo. A question arises here as to why the State's Assistant Attorney General would argue for award of this contract while such a memo existed from his immediate supervisor. We believe that had the DOT&PF been prudent in its investigation of the J.V., it should have determined that the aforementioned Alaska statutes had been violated. Therefore, we feel the contract should never have been awarded.

The **Utility Contractors of Alaska** are now concerned that SB 424 could possibly be stalled in the House by Representative Al Adams of the Kotzebue District, especially in light of statements quoted by the Anchorage Times newspaper article (Attachment #4), which reads "Adams, who also sits on the board of the village corporation, says he has no problems with local communities bidding. 'Where you have the resources and permits, you should participate,' he said. 'There's no unfair competition. Everybody has a chance to bid.' "

We disagree with this because the City of Kotzebue operates, in part, with state grants through which it can obtain construction equipment and maintenance facilities, at virtually little or no cost. This provides them with an unfair advantage over private contractors who can only obtain their equipment and facilities with monies made working those jobs such as the Kotzebue Airport Improvements project.

April 4, 1988
Page 3

Given these facts, the **Utility Contractors of Alaska** ask your support to ensure passage of SB 424, to preclude this unfortunate set of circumstances from ever arising again and thus adding to an already depressed construction industry. It is tough enough to survive in this business right now, let alone having to compete against a government entity that has an unfair, and possibly, illegal advantage.

Sincerely,

UTILITY CONTRACTORS OF ALASKA, INC.

A handwritten signature in cursive script, appearing to read "James C. Voigts", written in dark ink.

James C. Voigts
President

cc: Attorney General Grace Berg Schaible
DOT& PF Commissioner Mark S. Hickey
Bill Reeves, Associated General Contractors

JCV/mjm

1 IN THE SENATE

BY JONES AND FISCHER

2

SENATE BILL NO. 424

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to procurement by state agencies

7

from certain entities."

8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9

* Section 1. AS 36.30 is amended by adding a new section to read:

10

Sec. 36.30.760. PROHIBITION AGAINST CERTAIN CONTRACT AWARDS. If

11

a state agency solicits bids for a contract over \$150,000 by issuing

12

an invitation to bid under AS 36.30.100 - 36.30.190 or a request for

13

proposals under AS 36.30.200 - 36.30.270, the agency may not award the

14

contract to a bidder or offeror who is another state agency, a politi-

15

cal subdivision of the state, a partnership whose partners include a

16

state agency or political subdivision of the state, or a joint venture

17

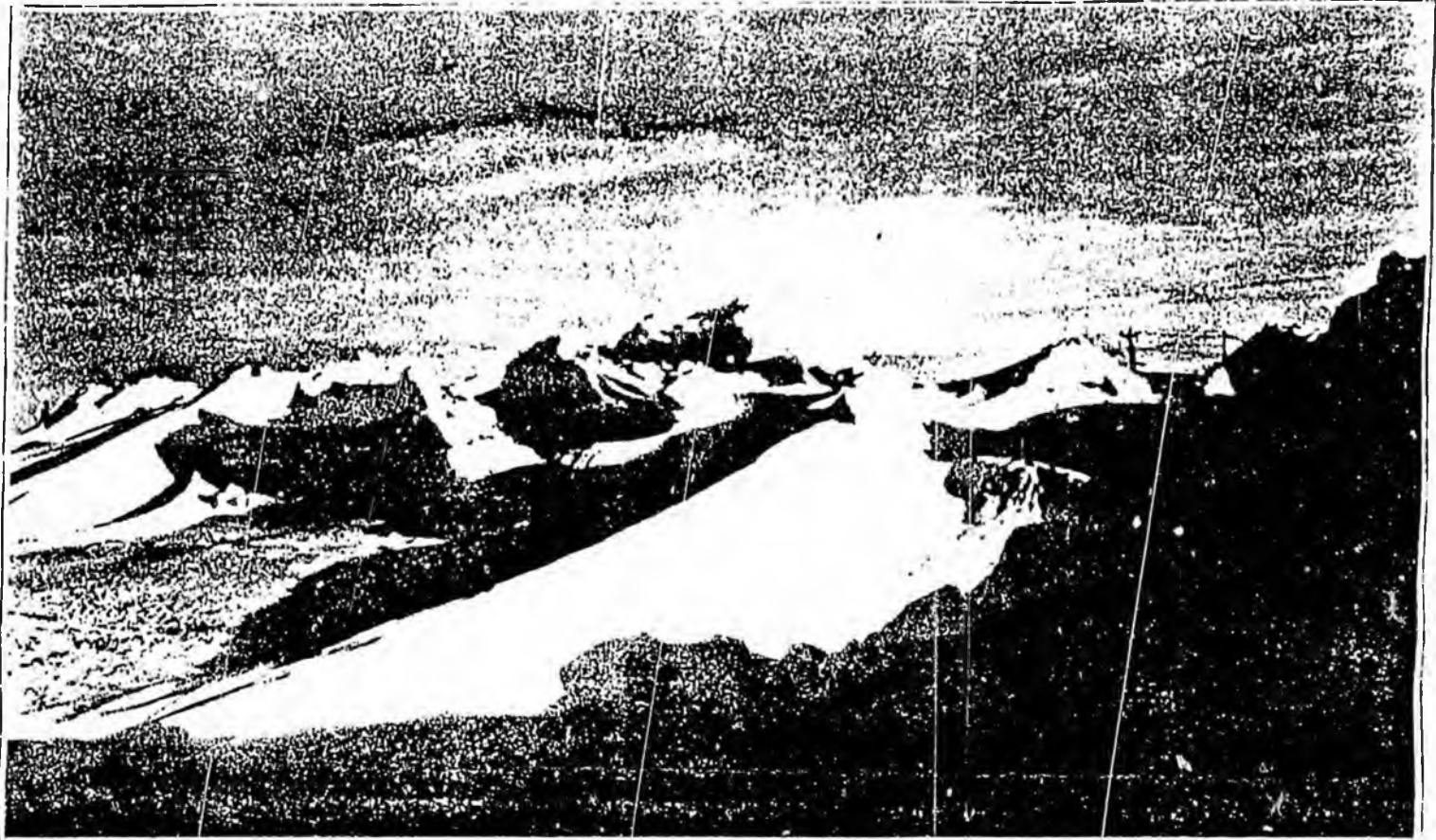
whose venturers include a state agency or political subdivision of the

18

state. In this section, "political subdivision" includes school

19

districts.



One of Kotzebue's more prominent "mountain ranges" located near the airport.

Sparks fly at council meeting

by Ben Neuschwan
Staff Reporter

Angry words and accusations of misconduct punctuated the Kotzebue City Council regular meeting Feb. 18, when Jeff Smith questioned council members about the city's financial arrangement with R.S. Store Inc., one of the airport improvement's joint venture partners.

Smith, who spoke during the citizen's comments of the council meeting, said rumors had been circulating that the council had loaned \$300,000 to a private individual.

"I find it just incredible that the city loaned \$300,000 to Bish," Smith said. "We talk about closing the library, talk about needing money for the Rec

Center. How many employees are forced to take pay cuts? Service after service is threatened, there are debts that the city owes, yet the city loans \$300,000 to a private enterprise. It's just incredible."

Smith was referring to Bish Gallahorn, president of R.S. Store Inc.

Smith said he didn't realize the city was a financial institution and added: "It's financial dealings like this that got our city in trouble."

City Manager Mike Scott, visibly taken back by Smith's comments, said the loan had been discussed during public hearings and if the city had not loaned the money the joint venture would have lost the bid.

"If you had attended the public hearings, you would have known

what was going on," Scott told Smith. "The city went into a joint venture agreement with KIC and R.S. Store Inc. We bid on the project, and when it came time to place the bond, R.S. Store Inc. couldn't come up with the cash. The project was on the line."

Scott said the loan agreement was to the city's benefit and would amount to a net gain of \$18,000. According to Scott, R.S. Store Inc. borrowed the money at 12.5 percent interest and offered collateral worth two times that of the initial money.

"Get down to the basics," Scott told Smith. "Would you throw away the bid, lose the jobs and economic development to the city? We were in a perfect position. We had two-to-one protection, no financial institution would have given us that"

Smith said he never insinuated the city had made illegal dealings behind closed doors. He said he felt obligated to come forward and put this issue on the table.

"When rumors get started," Smith said, "you don't hear the good things. You think something nefarious is going on."

After the council meeting, Scott said he was very surprised at Smith's statements.

"I was totally surprised," Scott said. "I had just talked to him yesterday, and he said nothing about this."

Scott added Smith spoke in an accusatory tone and said he thought it wasn't right for Smith to bring the subject up in that manner.

"I'm all for citizens coming in
... continued on page 6.

ire committee ponders own fate

he of a lack of local hire on two Manillaq Association and the region.

Marie Greene agreed with C. Key.

arks . . . from page 1.

alking to the council," Scott said. "But he (Smith) came in with claims and assertions, and so so loosely shouldn't be treated. It's irresponsible to make no legitimate attempt to talk to anyone concerning this."

Friday Smith, a former city council member who now does consulting work for the borough, said his action at the meeting "may have been compulsive on my part, but he felt the issue had to be out in the open."

After discussing the rumors with a council member, Smith said he was urged by the council member to come to the council meeting and air his views. Smith wanted to name the council member. His wife had also urged him to speak his mind at the meeting, he said.

"It was getting personal," Smith said. "It was an action I was wrong. They've got to justify their actions, I don't think they're right. I'm not one who believes the ends justifies the means."

Smith added he felt he did the

city a service.

Scott said at the time of the joint venture agreement for the \$2 million airport improvement project bid, it was assumed that all parties had enough money to cover the bond. When R.S. Store Inc. indicated it could not come up with the money, there was discussion about what the city should do.

The city did not want to lose the bid, Scott said, and the bond had to read the city as the bid, with the city, KIC and R.S. Store Inc. as backers of the bond. Scott said there wasn't much time to get the money together before the bid deadline. Under that time factor, KIC wouldn't be able to meet and approve a loan, so Scott suggested the city loan the money.

"From that point on we called a special public meeting to discuss the loan," Scott said. "It was well publicized."

The council unanimously approved the loan in its Oct. 5 special open meeting. Scott said the money was a part of the municipal investment account and was simply switched to another

investment account, where it is still drawing interest.

The loan originally had a repayment deadline of 90 days. That deadline was extended an additional 90 days after Gallahorn approached the city council on Jan. 22 and asked for an extension. In the closed executive session concerning finances, the council unanimously approved the 90 day extension. The repayment deadline is April 14.

The city had initially approached R.S. Store Inc. and KIC because the city could not do the airport improvement project alone and needed the heavy equipment of the other two.

Gallahorn said his company ran into a financial problem when it tried to raise money for the bond. According to Gallahorn, this was around the time N.B.A. took over from Bank of the North and because his company had no relationship with the new bank, it was difficult to establish credit with them.

"We looked at the options," Gallahorn said. "And thought about scrapping the job. The city had pretty good reasons for wanting the job to go through — provide jobs, improve the airport

economic development."

Gallahorn said the city should be commended for arranging the loan.

"How many millions of dollars has the city and the people of Kotzebue lost to outside contractors?" Gallahorn asked. "They should use this as a matter of policy."

Among the highlights of additional city council action was the approval of a land transfer between the Indian Health Service and the city, interest in the Nome to Siberia flights, a city local hire report, the city's monthly financial statement and the first reading of a joint insurance agreement among Alaska municipalities and school districts.

"The council unanimously passed a resolution transferring IHS property on 3rd Avenue to the city."

The 1.9 acre property, estimated by Scott as having a value of \$350,000, contains the city water tank, public works treatment plant, transit building and storage shed.

According to the terms of the contract, the city agrees to maintain the property for the operation and maintenance of sanitation facilities and to keep the facility in effective operating condition.

A small tract of the property will be leased back to IHS on a 10-year contract for \$1 a year, with an option to renew at the end of the period. The 2-acre lot will be used as a material staging area, regional support center and equipment repair and storage site for ongoing projects in the Maniilaq region.

"Council members discussed the feasibility of a Siberian goodwill trip after receiving the travel offer from a letter submitted to the council by NANA Museum Director Kari

Westlund.

In the Feb. 5 letter, Westlund said she had been asked to assemble a group from Kotzebue to join in on the proposed flights from Nome to Provideniya, a village in the Soviet Far East.

Scott said a delegation to promote tourism, express friendship and goodwill and to check on economic possibilities in Siberia would be beneficial to the city. He said he'd also be interested in a sister city in Siberia.

Westlund told the council members the original sponsors of the trip would hold four to six seats for Kotzebue representatives. The Nome group has set a travel target date of March 15. She said accommodations in the village were limited and the trips were being scheduled for a day trip only.

Jim Stimpfle, organizer of the Nome to Provideniya trip, said in a later interview the flight had been postponed until sometime in April or May. The lack of passports and an indication that Gov. Cowper will be among the passengers on the proposed trip is responsible for the delay, he said.

"The council members also went over the resident employment status report from Oct. 1986 to Dec. 1987.

As a matter of contrast, two projects that were initiated before the local hire ordinance was 35 percent of the total work force were Kotzebue residents who

enacted in 1986 and were not city projects were analyzed.

On the Kotzebue Amory Project supplied 25.2 percent of the total work hours.

The Kotzebue Elementary School Renovation Project had a local work group of 25 percent and but supplied 65.6 percent of total work hours.

In comparison, of the 109 full and part-time jobs created by five capital projects beginning Oct. 1, 1986, all were filled by local residents.

Scott said the report showed a dramatic difference in local hire since the formation of the local hire commission and enactment of the ordinance.

"This report proves that the ordinance has fulfilled its original intent and that local hire needs to remain a prominent issue of the city," Scott said. "Local hire should not be swept under the carpet or placed on the back burner."

"In further council action, Scott submitted the city's financial statement and said the city was right on track. He said the city was in good shape and was six months ahead in its repayment schedules.

According to Scott, the \$2.7 million city debt was been reduced to \$1 million. He said the city debts were well on their way to recovery.

"The council also had the first reading of the Alaska Municipal League Joint Insurance Arrangement.

The joint insurance agreement approved by the 1986 Alaska Legislature provides means for local governments and school districts to join together in an insurance pool to avoid some of the problems arising from conventional insurance markets. The JIA would offer insurance premium stability, according to Scott.

The arrangement would also establish a non-profit association to provide risk management services for Alaska municipalities, city and borough school districts and regional attendance areas.

In order to become a member of the JIA, the city would have to join the association, approve the agreement and pledge to appropriate sufficient funds for annual premiums and assessments for at least three years or until all payment obligations have been fulfilled.

The council members voted for a March 3 public work session to go over the insurance documents. The session will begin at 5:00 p.m. in the council chambers.

"The council also approved an \$85 donation for the Students-In-Space program at Kotzebue Middle School. The donation will be used in purchasing one flight suit.

Eight students at the Middle School are involved in the after-school program organized by 3rd grade elementary teacher Urtha Lenhart. The program offers extensive study on becoming astronauts.

In later interview with Lenhart, he said with the city's donation it looked as if the cost of the flight suits for the students would be covered. The Lion's Club donated enough money for three suits and the rest of the money came from other organizations and individuals, he said.

The students are also seeking donations for a guest speaker.



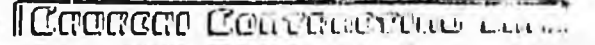
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MEMORANDUM

State of Ala

TO: Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional
Affairs

DATE: April 7, 1987

FILE NO: 663-87-0189

TELEPHONE NO: 463-3600

FROM: Grace Berg Schaible
Attorney General

SUBJECT: Municipality as general contractor for public works project

Thru: *Marjorie L. Odland*
Marjorie L. Odland
Assistant Attorney General
Governmental Affairs-Juneau

By: Bruce Weyhrauch *Bruce Weyhrauch*
Legal Assistant
Governmental Affairs-Juneau

You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no.

We have previously opined that municipalities performing work on public works projects, a practice commonly referred to as "forced accounting," are not required to pay prevailing wages under AS 36.05.010 -- 36.05.110 (Little Davis Bacon Act), 1983 Inf. Op. Att'y Gen. (Apr. 19, 663-83-0554). See 1983 Inf. Op. Att'y Gen. (Mar. 11, 663-83-0267). We have also approved of situations where municipalities carry out their public construction projects by hiring private contractors to perform project management and supervision while using municipal employees to do the construction work. 1978 Inf. Op. Att'y Gen. (Oct. 11, 663-79-0195). However, none of these opinions address the question posed. Based upon our analysis, we find that a municipality may not act as a general contractor on competitively bid public works projects.

Generally, the policy of the Department of Transportation and Public Facilities (DOT/PF) is "to require the construction of all public works under bid contracts." AS 35.15.010. Public work contracts are required to comply with Title 35, AS 36.30 (the State Procurement Code), and regulations adopted under those laws. AS 35.15.040. 1/ Contractor is defined as "the contractor including subcontractors performing work necessary to

1/ The effective date of AS 35.15.040 and AS 36.30 is July 1, 1987.

facilitate public construction." AS 36.95.010(1). 2/ DOT/PF is given the authority to "enter into contracts or agreements relating to public works with ... political subdivisions...." AS 35.-05.040(7).

Basically, the legislature has provided three ways for the construction of public works projects. First, if a project is estimated to cost less than \$100,000, or if it is in the best interests of the state, DOT/PF may perform the work. AS 35.15.-010. Second, when the estimated construction costs exceed \$100,000, DOT/PF must advertise, request bids, and award contracts competitively. See AS 35.15.020 -- 35.15.050. Third, a municipality can request DOT/PF to give the municipality all the authority to plan and construct "public works projects of the state which [are] to be located within the boundaries or the operating area of the municipality...." AS 35.15.080(a). See 1981 Inf. Op. Att'y Gen. (May 29; 663-81-0044).

Nothing in Alaska law specifically prohibits municipalities from acting as a general contractor on competitively bid contracts. And, the powers given local government units are to be liberally construed. See Alaska Const. art. X, § 1; AS 29.-35.400. Yet, if an affirmative response is given to your question, ostensibly, a municipality could bid on all kinds of public works projects in all areas of the state, just like any other general contractor. We believe the legislature did not intend to give municipalities this authority. By specifically bestowing upon a municipality the authority to "adopt" the planning and construction of public works projects located within the boundaries of the municipality under AS 35.15.080 the legislature intended to give municipalities the authority to carry out public works projects without competition. Similarly, the legislature constrained municipalities to assume the construction of relevant public works projects only within the boundary or operating area of the municipality. AS 35.15.080(a). By implication, a municipi-

2/ AS 39.95.010(3) defines public works as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redcoration of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board...." AS 35.25.020(7) defines public work as "a structure or project constructed or maintained by [DOT/PF] except airports and highways and includes public buildings, boat harbors, port facilities, dikes, jetties, and breakwaters." A political subdivision of the state includes boroughs, cities, and villages. AS 36.95.010(6).

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

April 7, 1987
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pality venturing outside its boundaries to compete with the private sector for public works projects would be engaging in an ultra vires act, because this action is neither allowed by statute nor by municipal charter. Cochran v. City of Nome, 10 Alaska 425, 435 (D.C. Alaska 1944). See 10 E. McQuillin, The Law of Municipal Corporations § 29.104c (3d ed. 1981); 3A C. Antieau, Independent Local Government Entities § 30B.08 (1987) ("Ultra vires contracts are agreements beyond the borough's power under all circumstances."). See generally 72 C.J.S. Supp. Public Contracts § 4 (1975). On a practical level a municipality competitively bidding against private sector contractors would, in all probability, cause quite a political fuss and raise numerous logistic, ethical, and practical problems for the municipality.

Finally, as we noted earlier, powers given local governments are liberally construed. E.g., Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1120 (Alaska 1979). In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) (footnote omitted). Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Notwithstanding this conclusion, municipalities are not completely barred from competing with members of the private sector, such as general contractors.

Engaging in enterprises usually owned and operated by private individuals has also been sanctioned provided the public interest so requires. The opinion has been given that as long as the city refrains from extending its activity into active competition with private enterprise in dealing with others, it should be allowed considerable latitude in providing for itself those things necessary to carry on a legitimate municipal function if there are valid reasons for becoming a self-supplier. The word "private," as used in the opinions discussing the powers of a municipality, is used to designate proprietary as distinguished from governmental functions.

12 E. McQuillin, The Law of Municipal Corporations § 36.02 (3d

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

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ed. 1986) (emphasis added, footnotes omitted). But that competi-
tion is limited by what the legislature allows.

A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions, but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

Ravettino v. City of San Diego, 160 P.2d 52, 56 (Cal. 1945) (emphasis added). Accord Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661 (Me. 1975); Keeter v. Town of Lake Lure, 141 S.E.2d 634, 643 (N.C. 1965). See Stanley v. Dept. of Conservation & Dev., 199 S.E.2d 641, 652 (N.C. 1973) ("A municipal corporation ... even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature.")

We hope this answers your question. If we can be of further assistance, please feel free to call.

BW/pjg

cc: Michael Cushing, Planner
DCRA/KARAD - Juneau

Michael Tsvoliero, City Manager
Moonah

Robert M. Maynard, Esq.
Assistant Attorney General
Dept. of Law - Juneau

Wednesday, March 2, 1988, The Anchorage Times B-3

Builders mad over Kotzebue bid

By Robert Laurie
Times Juneau Bureau

JUNEAU — Last fall, the state Department of Transportation awarded a \$1.8 million contract for work at the Kotzebue airport to a joint venture made up of the Kotzebue village corporation, a local contractor, and the city of Kotzebue.

The involvement of the city of Kotzebue has Alaskan contractors upset. They say it's a threat to their livelihood and the free enterprise system.

Representatives of the Alaska General Contractors testified Tuesday afternoon before a Senate committee in favor of a bill that would prohibit such contracts in the future.

"The bill simply says that we won't allow our municipalities or government entities to compete with private business in bidding state contracts," said bill sponsor Sen. Lloyd Jones, R-Ketchikan. "Municipalities have marginal or non-existent debt service on equipment, where your con-

tractors have to use depreciation schedules. And they don't have government funds on their equipment."

AGC executive director Bill Schneider says it's the first time a local government has bid on a state project.

"Quite frankly we think there are some inequities in that," he said. "We don't think that government should be competing with private enterprise in the building of projects."

State Transportation commissioner Mark Hickey says the department had no choice but to award the bid to the joint venture after an attorney general's review found nothing prohibiting Kotzebue's participation in the contract, but he agrees it raises some questions of fairness.

"A municipality can bring things to the table a private contractor can't," he said.

Kotzebue Rep. Al Adams doesn't think much of AGC's protest.

"I think it's sour grapes by an

organization I used to support," he said.

Adams, who also sits on the board of the village corporation, says he has no problems with local communities bidding.

"Where you have the resources and permits, you should participate," he said. "There's no unfair competition. Everybody has a chance to bid."

Sen. Willie Hensley, D-Kotzebue, said the Kotzebue contract is just a little different version of other contracting done by the state.

Many capital construction projects funded by the state in rural Alaska are administered by local communities. The municipal governments use "force accounting," or "transfer of responsibility" agreements to manage the contracts.

"I can understand why the AGC would be a little agitated by such an idea," said Hensley.

Still, he said it was made to order for Kotzebue, "and more power to them."

The project expands the aircraft parking apron at Kotzebue's Ralph Wien Memorial airport using about 75,000 cubic yards of gravel dredged from the Kotzebue lagoon.

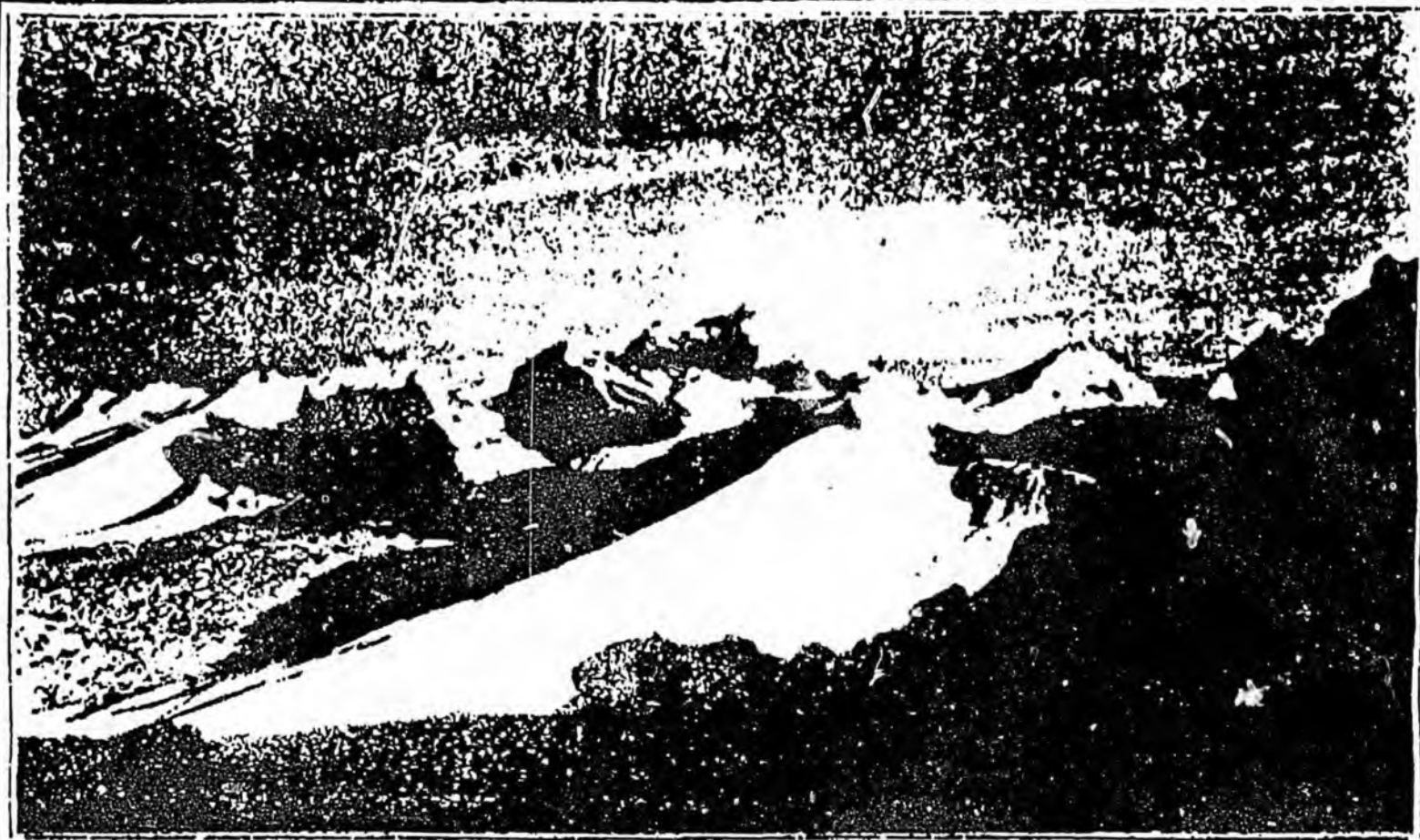
Up to 16 pieces of heavy equipment; dozers, loaders, and dump trucks, are involved in the project. Eight of the units are owned by the city. The dredge is owned by the Kikiktagruk Inupiat Corporation, the Kotzebue village corporation.

The next lowest bid, from Brown Construction of Kenai, was nearly \$500,000 higher.

In a protest to the department of transportation, Brown said the city's inclusion in the joint venture gave an "unfair competitive advantage" to the other two members of the joint venture and may have represented a misuse of public funds for private gain.

The department, and later a superior court, rejected the claims.

SURPRISE



One of Kotzebue's more prominent "mountain ranges" located near the airport.

Sparks fly at council meeting

by Den Neuschwan
Staff Reporter

Angry words and accusations of misconduct punctuated the Kotzebue City Council regular meeting Feb. 18, when Jeff Smith questioned council members about the city's financial arrangement with R.S. Store Inc., one of the airport improvement's joint venture partners.

Smith, who spoke during the citizen's comments of the council meeting, said rumors had been circulating that the council had loaned \$300,000 to a private individual.

"I find it just incredible that the city loaned \$300,000 to Bish," Smith said. "We talk about closing the library, talk about needing money for the Rec

Center. How many employees are forced to take pay cuts? Service after service is threatened, there are debts that the city owes, yet the city loans \$300,000 to a private enterprise it's just incredible."

Smith was referring to Bish Callahorn, president of R.S. Store Inc.

Smith said he didn't realize the city was a financial institution and added: "It's financial dealings like this that got our city in trouble."

City Manager Mike Scott, visibly taken back by Smith's comments, said the loan had been discussed during public hearings and if the city had not loaned the money the joint venture would have lost the bid.

"If you had attended the public hearings, you would have known

what was going on," Scott told Smith. "The city went into a joint venture agreement with KIC and R.S. Store Inc. We bid on the project, and when it came time to place the bond, R.S. Store Inc. couldn't come up with the cash. The project was on the line."

Scott said the loan agreement was to the city's benefit and would amount to a net gain of \$18,000. According to Scott, R.S. Store Inc. borrowed the money at 12.5 percent interest and offered collateral worth two times that of the initial money.

"Get down to the basics," Scott told Smith. "Would you throw away the bid, lose the jobs and economic development to the city? We were in a perfect position. We had two-to-one protection, no financial institution would have given us that."

Smith said he never insinuated the city had made illegal dealings behind closed doors. He said he felt obligated to come forward and put this issue on the table.

"When rumors get started," Smith said, "you don't hear the good things. You think something nefarious is going on."

After the council meeting, Scott said he was very surprised at Smith's statements.

"I was totally surprised," Scott said. "I had just talked to him yesterday, and he said nothing about this."

Scott added Smith spoke in an accusatory tone and said he thought it wasn't right for Smith to bring the subject up in that manner.

"I'm all for citizens coming in ... continued on page 6."

ire committee ponders own fate

and talking to the council," Scott said. "But he (Smith) came in making claims and assertions, and to do so so loosely shouldn't be tolerated. It's irresponsible. He made no legitimate attempt to contact anyone concerning this issue."

On Friday Smith, a former city council member who now does consulting work for the borough, said his action at the meeting could have been compulsive on his part, but he felt the issue needed to be out in the open.

After discussing the rumors with a council member, Smith said he was urged by the council member to come to the council meeting and air his views. Smith declined to name the council member. His wife had also encouraged him to speak his mind at the meeting, he said.

"It was nothing personal," Smith said. "It was an action I feel was wrong. They've got reasons to justify their actions, but I don't think they're adequate. I'm not one who believes the ends justifies the means."

Smith added he felt he did the

city a service.

Scott said at the time of the joint venture agreement for the \$2 million airport improvement project bid, it was assumed that all parties had enough money to cover the bond. When R.S. Store Inc. indicated it could not come up with the money, there was discussion about what the city should do.

The city did not want to lose the bid, Scott said, and the bond had to read the same as the bid, with the city, KIC and R.S. Store Inc. as backers of the bond. Scott said there wasn't much time to get the money together before the bond deadline. Under that time factor, KIC wouldn't be able to meet and approve a loan, so Scott suggested the city loan the money.

"From that point on we called a special public meeting to discuss the loan," Scott said. "It was well publicized."

The council unanimously approved the loan in its Oct. 5 special open meeting. Scott said the money was a part of the municipal investment account and was simply switched to another

bill drawing account. The loan originally had a repayment deadline of 90 days. That deadline was extended an additional 90 days after Callahorn approached the city council on Jan. 22 and asked for an extension. In the closed executive session concerning finances, the council unanimously approved the 90 day extension. The repayment deadline is April 14.

The city had initially approached R.S. Store Inc. and KIC because the city could not do the airport improvement project alone and needed the heavy equipment of the other two.

Callahorn said his company ran into a financial problem when it tried to raise money for the bond. According to Callahorn, this was around the time N.B.A. took over from Bank of the North and because his company had no relationship with the new bank, it was difficult to establish credit with them.

"We looked at the options," Callahorn said. "And thought about scrapping the job. The city had pretty good reasons for wanting the job to go through - provide jobs, improve the airport

Callahorn said the city should be commended for arranging the loan.

"How many millions of dollars has the city and the people of Kotzebue lost to outside contractors?" Callahorn asked. "They should use this as a matter of policy."

Among the highlights of additional city council action was the approval of a land transfer between the Indian Health Service and the city, interest in the Nome to Siberia flight, a city local hire report, the city's monthly financial statement and the first reading of a joint insurance agreement among Alaska municipalities and school districts.

"The council unanimously passed a resolution transferring IHS property on 3rd Avenue to the city.

The 1.9 acre property, estimated by Scott as having a value of \$150,000, includes the city water tank, public works treatment plant, waste building and storage shed.

According to the terms of the contract, the city agrees to maintain the property for the operation and maintenance of sanitation facilities and to keep the facility in effective operating condition.

A small tract of the property will be leased back to IHS on a 10-year contract for \$1 a year, with an option to renew at the end of the period. The 2-acre lot will be used as a material staging area, regional support center and equipment repair and storage site for ongoing projects in the Manilla region.

"Council members discussed the feasibility of a Siberian goodwill trip after receiving the travel offer from a letter submitted to the council by NANA Museum Director Karl

Westlund.

In the Feb. 3 letter, Westlund said he had been asked to assemble a group from Kotzebue to join in on the proposed flight from Nome to Provideniya, a village in the Soviet Far East.

Scott said a delegation to promote tourism, express friendship and goodwill and to check on economic possibilities in Siberia would be beneficial to the city. He said he'd also be interested in a sister city in Siberia.

Westlund told the council members the original sponsors of the trip would hold four to six seats for Kotzebue representatives. The Nome group has set a travel target date of March 15. She said accommodations in the village were limited and the trips were being scheduled for a day trip only.

Jim Stimpfle, organizer of the Nome to Provideniya trip, said in a later interview the flight had been postponed until sometime in April or May. The lack of passports and an indication that Gov. Cowper will be among the passengers on the proposed trip is responsible for the delay, he said.

"The council members also went over the resident employment status report from Oct. 1986 to Dec. 1987.

As a matter of contrast, two projects that were initiated before the local hire ordinance was 33 percent of the total work force were Kotzebue residents who

projects were initiated.

On the Kotzebue Army Project supplied 33.2 percent of the total work force.

The Kotzebue Elementary School Renovation Project had a local work group of 23 percent and but supplied 63.6 percent of total work force.

In comparison, of the 109 full and part-time jobs created by five capital projects beginning Oct. 1, 1986, all were filled by local residents.

Scott said the report showed a dramatic difference in local hire since the formation of the local hire commission and enactment of the ordinance.

"This report proves that the ordinance has fulfilled its original intent and that local hire needs to remain a prominent issue of the city," Scott said. "Local hire should not be swept under the carpet or placed on the back burner."

"In further council action, Scott submitted the city's financial statement and said the city was right on track. He said the city was in good shape and was six months ahead in its repayment schedules.

According to Scott, the \$2.7 million city debt has been reduced to \$1 million. He said the city debts were well on their way to recovery.

The council also had the first reading of the Alaska Municipal League Joint Insurance Arrangement.

The joint insurance agreement approved by the 1986 Alaska Legislature provides means for local governments and school districts to join together in an insurance pool to avoid some of the problems arising from conventional insurance markets. The JIA would offer insurance premium stability, according to Scott.

The arrangement would also establish a non-profit association to provide risk management services for Alaska municipalities, city and borough school districts and regional attendance areas.

In order to become a member of the JIA, the city would have to join the association, approve the agreement and pledge to appropriate sufficient funds for annual premiums and assessments for at least three years or until all payment obligations have been fulfilled.

The council members voted for a March 3 public work session to go over the insurance documents. The session will begin at 3:00 p.m. in the council chambers.

"The council also approved an \$85 donation for the Students-in-Space program at Kotzebue Middle School. The donation will be used in purchasing one flight suit.

Eight students at the Middle school are involved in the after-school program organized by 3rd grade elementary teacher Urtha Lenhart. The program offers extensive study on becoming astronauts.

In later interview with Lenhart, he said with the city's donation it looked as if the cost of the flight suits for the students would be covered. The Lion's Club donated enough money for three suits and the rest of the money came from other organizations and individuals, he said.

The students are also seeking donations for a guest speaker.



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Alaska State Legislature

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MIKE SZYMANSKI
FRED ZHAROFF



P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4989

Senate Community and Regional Affairs Committee

March 1, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff

RE: CSSB 424 - "An Act relating to procurement by the Department of Transportation and Public Facilities from certain entities."

This CS would prohibit DOT/PF from awarding construction contracts greater than \$150,000 to state agencies, political subdivisions, or joint ventures involving these parties. The CS limits the scope of the bill to construction contracts administered by DOT/PF. The differs from the original which dealt with all state contracts. The change in the CS is supported by the sponsor and the Associated General Contractors.

A zero fiscal note and additional backup material is included in the packet. Senator Jones and a representative of DOT/PF will be at the meeting as will the board of directors of the Associated General Contractors.

ALASKA STATE LEGISLATURE


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3813 Denali Street
Ketchikan, AK 99901
907-225-9082

While in Juneau
P.O. Box V
Juneau, AK 99811
907-465-3743

Senator Lloyd Jones

MEMORANDUM

TO: Senate members,
Community & Regional Affairs

FROM: Senator Lloyd Jones 

RE: Senate Bill 424

I introduced SB 424, "An Act relating to procurement by state agencies from certain entities," because of my concern that state government should help the private sector, not hinder or compete with it.

In a nutshell, it was my intent with this piece of legislation to prevent municipalities from competing with private contractors on state jobs.

There have been a couple of instances lately where municipal organizations either by themselves or in conjunction with a partner have bid or wanted to bid on state projects. It is unfair to private businesses to compete with publicly funded, not-for-profit organizations.

This bill has the support of labor as well as management in the construction industry. Thank you for giving it your fullest consideration.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB424
PUBLISH DATE:

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act relating to procurement by state agencies from certain entities.
Sponsor: Jones and Fischer
Requestor: Sturgulewski

Agency Affected: DOT&PF
BR 11
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

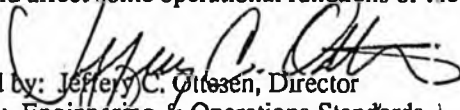
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Because of the relatively few examples the department can refer to where a municipality or state agency actively competed for a bid or professional service solicitation, this bill would appear to have minimal or no impact on staffing or cost. It could affect some operational functions of the department, which are further described on the next page.

Prepared by:  Jeffrey C. Ottosen, Director
Division: Engineering & Operations Standards

Phone: 465-2951
Date: Feb. 29, 1988

Approved by Commissioner: 
Agency: Department of Transportation and Public Facilities

Date: 3/1/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Currently, the department has a number of relatively small operational-type contracts with other governmental agencies for a variety of purposes. These include contracts with local communities for docking of Marine Highway Vessels, terminal operations and ticketing for the Marine Highway system and contracts for maintenance and operations of airports and road systems. Other examples of disallowed inter-governmental contracting may occur depending on how the bill is interpreted. For example, if the department procures shipyard services at locations such as Ketchikan or Seward we may be viewed as being in violation of this proposed law. As each city controls a major shipyard, though leased to a shipyard service firm, legal questions may be raised as to an implied partnership or joint venture on the part of the city which owns or leases the shipyard facilities. A further potential conflict is with the anticipated selection of a southern terminus for the Alaska Marine Highway System. Many of the likely candidate sites involve a governmental entity, including the Alaska community of Hyder.

We believe the principal intent of this bill – to prevent governmental entities from competing in the construction arena – could be served while avoiding the types of conflicts described above with a simple language change. We suggest that the sentence on line 11 be amended as shown:

11 ...a state agency solicits bids for a construction contract over \$150,000 by issuing ...

With the change described above, the operational contracts described herein could continue while construction contracts would be subject to the limitations of public entity contracting as intended by this bill.

→ THIS HAS BEEN DONE IN THE CS. MCA

MEMORANDUM

TO: FILE
LEGISLATIVE COMMITTEE

FROM: WFR

RE: BIDS BY POLITICAL SUBDIVISIONS; SUGGESTED CHANGES

DATE: NOVEMBER 21, 1987

The following is a suggestion to amend existing state statutes to preclude state agencies and political subdivisions of the state from bidding on state contracts.

- Amend A.S. 36.30.110 by adding a new subsection to read:

(c) state agencies or political subdivisions of the state are prohibited from responding to an invitation to bid. Bids received from state agencies, political subdivisions of the state or a joint venture or corporation including a state or political subdivision shall not be accepted by the contracting agency.

QA/bidbymun.WFR

MEMORANDUM

State of Alaska

TO: Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional
Affairs

DATE: April 7, 1987

FILE NO: 663-87-0189

TELEPHONE NO: 465-3600

FROM: Grace Berg Schaible
Attorney General

SUBJECT: Municipality as general contractor for public works project

Marjorie L. Odland
Thru: Marjorie L. Odland
Assistant Attorney General
Governmental Affairs-Juneau

Bruce Weyhrauch
By: Bruce Weyhrauch
Legal Assistant
Governmental Affairs-Juneau

You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is: no.

We have previously opined that municipalities performing work on public works projects, a practice commonly referred to as "forced accounting," are not required to pay prevailing wages under AS 36.05.010 -- 36.05.110 (Little Davis Bacon Act). 1983 Inf. Op. Att'y Gen. (Apr. 19; 663-83-0554). See 1983 Inf. Op. Att'y Gen. (Mar. 11; 663-83-0267). We have also approved of situations where municipalities carry out their public construction projects by hiring private contractors to perform project management and supervision while using municipal employees to do the construction work. 1978 Inf. Op. Att'y Gen. (Oct. 11; 663-79-0195). However, none of these opinions address the question posed. Based upon our analysis, we find that a municipality may not act as a general contractor on competitively bid public works projects.

Generally, the policy of the Department of Transportation and Public Facilities (DOT/PF) is "to require the construction of all public works under bid contracts." AS 35.15.010. Public work contracts are required to comply with Title 35, AS 36.30 (the State Procurement Code), and regulations adopted under those laws. AS 35.15.040. ^{1/} Contractor is defined as "the contractor including subcontractors performing work necessary to

^{1/} The effective date of AS 35.15.040 and AS 36.30 is July 1, 1987.

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

April 7, 1987
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663-87-0189

facilitate public construction." AS 36.95.010(1). 2/ DOT/PF is given the authority to "enter into contracts or agreements relating to public works with ... political subdivisions...." AS 35.-05.040(7).

Basically, the legislature has provided three ways for the construction of public works projects. First, if a project is estimated to cost less than \$100,000, or if it is in the best interests of the state, DOT/PF may perform the work. AS 35.15.-010. Second, when the estimated construction costs exceed \$100,000, DOT/PF must advertise, request bids, and award contracts competitively. See AS 35.15.020 -- 35.15.050. Third, a municipality can request DOT/PF to give the municipality all the authority to plan and construct "public works projects of the state which [are] to be located within the boundaries or the operating area of the municipality...." AS 35.15.080(a). See 1981 Inf. Op. Att'y Gen. (May 29; 663-81-0044).

Nothing in Alaska law specifically prohibits municipalities from acting as a general contractor on competitively bid contracts. And, the powers given local government units are to be liberally construed. See Alaska Const. art. X, § 1; AS 29.-35.400. Yet, if an affirmative response is given to your question, ostensibly, a municipality could bid on all kinds of public works projects in all areas of the state, just like any other general contractor. We believe the legislature did not intend to give municipalities this authority. By specifically bestowing upon a municipality the authority to "adopt" the planning and construction of public works projects located within the boundaries of the municipality under AS 35.15.080 the legislature intended to give municipalities the authority to carry out public works projects without competition. Similarly, the legislature constrained municipalities to assume the construction of relevant public works projects only within the boundary or operating area of the municipality. AS 35.15.080(a). By implication, a munici-

2/ AS 39.95.010(3) defines public works as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecoration of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board...." AS 35.25.020(7) defines public work as "a structure or project constructed or maintained by [DOT/PF] except airports and highways and includes public buildings, boat harbors, port facilities, dikes, jetties, and breakwaters." A political subdivision of the state includes boroughs, cities, and villages. AS 36.95.010(6).

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

April 7, 1987
Page #3
663-87-0189

pality venturing outside its boundaries to compete with the private sector for public works projects would be engaging in an ultra vires act, because this action is neither allowed by statute nor by municipal charter. Cochran v. City of Nome, 10 Alaska 425, 435 (D.C. Alaska 1944). See 10 E. McQuillin, The Law of Municipal Corporations § 29.104c (3d ed. 1981); 3A C. Antieau, Independent Local Government Entities § 30B.08 (1987) ("Ultra vires contracts are agreements beyond the borough's power under all circumstances."). See generally 72 C.J.S. Supp. Public Contracts § 4 (1975). On a practical level a municipality competitively bidding against private sector contractors would, in all probability, cause quite a political fuss and raise numerous logistic, ethical, and practical problems for the municipality.

Finally, as we noted earlier, powers given local governments are liberally construed. E.g., Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1120 (Alaska 1979). In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) (footnote omitted). Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Notwithstanding this conclusion, municipalities are not completely barred from competing with members of the private sector, such as general contractors.

Engaging in enterprises usually owned and operated by private individuals has also been sanctioned provided the public interest so requires. The opinion has been given that as long as the city refrains from extending its activity into active competition with private enterprise in dealing with others, it should be allowed considerable latitude in providing for itself those things necessary to carry on a legitimate municipal function if there are valid reasons for becoming a self-supplier. The word "private," as used in the opinions discussing the powers of a municipality, is used to designate proprietary as distinguished from governmental functions.

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

April 7, 1987
Page #4
663-87-0189

ed. 1986) (emphasis added, footnotes omitted). But that competition is limited by what the legislature allows.

A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions, but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

Ravettino v. City of San Diego, 160 P.2d 52, 56 (Cal. 1945) (emphasis added). Accord Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661 (Me. 1975); Keeter v. Town of Lake Lure, 141 S.E.2d 634, 643 (N.C. 1965). See Stanley v. Dept. of Conservation & Dev., 199 S.E.2d 641, 652 (N.C. 1973) ("A municipal corporation ... even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature.").

We hope this answers your question. If we can be of further assistance, please feel free to call.

BW/pjg

cc: Michael Cushing, Planner
DCRA/MARAD - Juneau

Michael Tavoliero, City Manager
Hoonah

Robert M. Maynard, Esq.
Assistant Attorney General
Dept. of Law - Juneau

KFC

1 IN THE SENATE

BY JONES AND FISCHER

2

SENATE BILL NO. 424

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to procurement by state agencies
7 from certain entities."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 36.30 is amended by adding a new section to read:

10 Sec. 36.30.760 PROHIBITION AGAINST CERTAIN CONTRACT AWARDS. If
11 a ~~state agency~~ ^{DOT/PP} solicits bids for a contract over \$150,000 by issuing
12 an invitation to bid under AS 36.30.100 - 36.30.190 or a request for
13 proposals under AS 36.30.200 - 36.30.270, the agency may not award the
14 contract to a bidder or offeror who is another state agency, a politi-
15 cal subdivision of the state, a partnership whose partners include a
16 state agency or political subdivision of the state, or a joint venture
17 whose venturers include a state agency or political subdivision of the
18 state. In this section, "political subdivision" includes school
19 districts.

DOT/PP contracts only

ALASKA STATE LEGISLATURE


Home Address
3813 Denali Street
Ketchikan, AK 99901
907-225-9082

While in Juneau
P.O. Box V
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Senator Lloyd Jones

MEMORANDUM

TO: Senate members,
Community & Regional Affairs

FROM: Senator Lloyd Jones 

RE: Senate Bill 424

I introduced SB 424, "An Act relating to procurement by state agencies from certain entities," because of my concern that state government should help the private sector, not hinder or compete with it.

In a nutshell, it was my intent with this piece of legislation to prevent municipalities from competing with private contractors on state jobs.

There have been a couple of instances lately where municipal organizations either by themselves or in conjunction with a partner have bid or wanted to bid on state projects. It is unfair to private businesses to compete with publicly funded, not-for-profit organizations.

This bill has the support of labor as well as management in the construction industry. Thank you for giving it your fullest consideration.



SKILL
RESPONSIBILITY
INTEGRITY

THE ALASKA CHAPTER
**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE, ALASKA 99509
TELEPHONE (907) 561-5354



3201 SPENARD ROAD
ANCHORAGE
WILLIAM E. SCHNEIDER
EXECUTIVE DIRECTOR

September 23, 1987

Mark Hickey, Commissioner
Department of Transportation
and Public Facilities
P.O. Box 2
Juneau, Alaska 99811

Dear Commissioner Hickey:

I am writing to register concern over the facts surrounding the bids for the improvements to Kotzebue's Ralph Wien Memorial Airport, DOT/PF Project No. 60434 AIP No. 3-02-0160-04.

The apparent low bidder on this \$1.8 million project includes the City of Kotzebue as a joint venture partner. To my knowledge this is the first time a political subdivision of the State has bid on a DOT/PF project.

The concept of a non-profit public corporation competing against private construction companies is contrary to principles of free enterprise. Quite simply, a private company cannot compete with a non-profit, non-taxable public entity which utilizes publicly owned and non-taxable equipment.

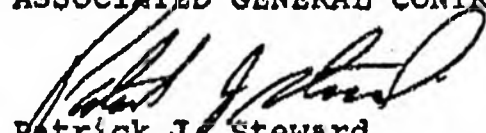
AGC Alaska requests a thorough investigation by DOT/PF into the responsiveness and appropriateness of this bid. Additionally, the capability of the joint venture to bond this project should be reviewed.

Mark Hickey, Commissioner
Page 2

Please keep me advised of your actions in this matter.

Sincerely,

ALASKA CHAPTER OF
ASSOCIATED GENERAL CONTRACTORS



Patrick J. Steward
President

cc: Lynn Harnisch, Regional Director
DOT/PF - Northern Region
AGC Board of Directors
Senator Jan Faiks
Representative Ben F. Grussendorf

WFR/mjc



SKILL
RESPONSIBILITY
INTEGRITY

THE ALASKA CHAPTER
**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE ALASKA 99509
TELEPHONE (907) 561-5354



3201 SPENARD ROAD
ANCHORAGE
WILLIAM E. SCHNEIDER
EXECUTIVE DIRECTOR

January 27, 1988

Mark Hickey, Commissioner
Department of Transportation &
Public Facilities
3132 Channel Drive
P.O. Box 2
Juneau, Alaska 99811

Re: Kotzebue Airport Project

Dear Commissioner Hickey,

On behalf of the contracting community in Alaska, AGC requests your response to un-resolved issues surrounding the award of a \$1.8 million Kotzebue Airport improvement project to a joint venture comprised in part by a political subdivision of the State.

This circumstance continues to warrant our attention because we believe a system which allows non-profit tax exempt political subdivisions of the State to bid on a competitive basis against private business undermines the free enterprise system on which this country and this State are founded.

In November 1987, at the AGC annual convention, you indicated that the award to the joint venture KIC Corporation /R. & S. Stores/City of Kotzebue (herein after referred to as the City of Kotzebue) was based on an attorney general's opinion. I am not certain you indicated a written opinion, but the audience assumed that to be the case.

I now understand the facts to be different. First, there was no written attorney general's opinion recommending project award to the City of Kotzebue. Second, a written attorney general's opinion was issued in a memorandum dated April 7, 1987 succinctly stating that a municipality may not act as a general contractor on a competitively bid public works project.

Commissioner Hickey
Page 2

The October 12, 1987 Intent to Award letter by DOT/PF Regional Director Lynn Harnish directly contradicts this April 7, 1987 attorney general's opinion. Harnish states in part:

There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreement. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on State construction contract, and the DOT/PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy.

The April 7, 1987 attorney general memorandum states in part:

- You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no. Finally as we noted earlier, powers given local governments are liberally construed. (Citations omitted) In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." (Citations omitted) Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Commissioner Hickey
Page 3

As you might guess, we find these revelations to be quite disturbing. Our concern is for the future. Are tax exempt political subdivisions going to be allowed to compete against the private sector? Will DOT/PF ignore the April 7, 1987 attorney general opinion if a similar situation occurs in the future?

I am sure you understand our concerns. Can you please indicate what if anything, DOT/PF plans on doing to address these concerns.

Sincerely,

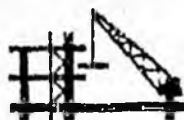
ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS



William E. Schneider
Executive Director

WES/mjc

\\WES\\HICKEY.LTR

**BROWN CONSTRUCTION COMPANY, INC**

GENERAL CONTRACTOR
BOX 1313 - KENAI, ALASKA 99611
(907) 283-9408

September 18, 1987

Mr. Robert Venusti
Department of Transportation/PF
Technical Services Bldg.
2301 Peger Road
Fairbanks, Alaska 99709-6364

Re: Notice of Bid Protest
Ralph Wien Memorial Airport
AIP NO.-3-02-0160-04
Project No.: 60434

Dear Robert Venusti:

This letter is a formal bid protest for the Kotzebue Airport Project which was tentatively awarded to the City of Kotzebue/ K.I.C./R&S Stone, Inc., a Joint Venture. As of September 17, 1987, no notice of "intent to award" had been issued.

I feel that the inclusion of the "City of Kotzebue" as a Joint Venture partner for a construction project may; (1) be a conflict of interest, (2) give "unfair competitive advantage" to K.I.C./R&S Stone, Inc. in obtaining the contract, (3) undercut the competitive bid process, (4) possibly misuse public funds for private gain, and (5) make the bid "unresponsive."

The apparent ability of K.I.C./R&S. Stone, Inc. to use city owned equipment and rely on city funds for bonding clearly seems inappropriate, to say the least. The bid bond for the project was posted by the City of Kotzebue. See Exhibit B. It usually takes a licensed General Contractor with a proven track record to obtain the proper bonds to perform contracts such as the Kotzebue Airport Project. The use of "city funds" to provide bonding undercuts other contractors' abilities to compete on a fair basis. Brown maintains that the low bid submitted by the Joint Venture reflects the advantage gained by including a municipal entity in the partnership. (Brown's Bid \$2,262,911.00 - Joint Venture's Bid \$1,791,501.00.) The municipality's participation creates the definite appearance of a "conflict of interest."

Mr. Robert Venusti
September 18, 1987
Page Two

If Brown Construction Inc. had known that the City of Kotzebue was going to be a participant in the bidding process, Brown would never have gone to the expense of preparing a bid in the first place. The participation of the "City of Kotzebue" cannot be found on the planholders list. See Exhibit C. The use of "city funds" seemingly allows a private individual, i.e., Joint Venture partners, to profit with the use of funds which are derived from the citizens of Koztebue (Public Funds). The use of such funds could provide the basis for an injunction to prohibit the City of Kotzebue from using any funds on the project.

In addition, any proposed use of city owned equipment by the Joint Venture adds to the "unfair advantage" gained at the expense of other bidders. The DOT/PF should also note that all Joint Venture partners have agreed to sign for bonding on the project. See Proposal submitted to DOT/PF by Joint Venture (Exhibit A). The DOT/PF should determine whether or not a surety will even bond an unlicensed municipality involved in a joint venture. The unfair advantage which the Joint Venture has over other contractors becomes even more apparent if the City of Kotzebue intends to furnish a cash bond for the Joint Venture. All other contractors that cannot rely on municipal funds are put at a disadvantage since commercial sureties or private cash bonds must be relied upon by non-municipal entities. The DOT/PF could end up using the municipal funds, i.e. cash bond, to complete the project, in the event of incomplete performance on behalf of the contractor.

The DOT/PF may find it useful to review the Joint Venture agreement between the parties in order to clarify some of the issues mentioned above. A Joint Venture similiar to the Kotzebue/K.I.C/ R & S Stone Inc. is required to keep a copy of the agreement on file at each parties main place of business. See 12 AAC 21.010, Joint Venture Agreement, A.S. 08.18.011. Also see Exhibit D.

If a precedent is set which allows "municipalities" to compete against private enterprise in the construction business, the competitive bid process will ultimately suffer as will the individual contractor. Brown requests that DOT/PF reject the Joint Venture's bid and accept the next lowest bid which was prepared in accordance with recognized standards for bidding on public projects. Please contact me concerning DOT/PF's position on this matter immediately.

Very truly yours,

Don Brown

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

STEVE COWPER, GOVERNOR

3301 PEGER ROAD
FAIRBANKS, ALASKA 99709-5316
PHONE: (907) 461-2210

October 12, 1987

Re: Kotzebue Airport Improvements
Project No. 60434

Brown Construction
P.O. Box 1313
Kenai, Alaska 99611

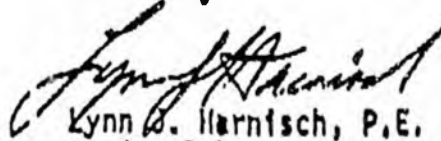
Kotzebue/KIC/R & S Stores, Inc., J.V.
P.O. Box 46
Kotzebue, Alaska 99762

Gentlemen:

Having considered the bid protest of Brown Construction, and reviewing the materials submitted by Brown Construction and Kotzebue/KIC/R & S Stores, JV, it is my decision to deny the bid protest. There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreements. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on a state construction contract, and the DOT&PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy. It is for the legislature to determine whether, as a matter of policy, governmental entities should be permitted to compete for public contracts.

The contract for Project No. 60434 will be awarded to Kotzebue/KIC/R&S Stores, JV. It is expected that the contract award will be made on October 14, 1987.

Sincerely


Lynn G. Harnisch, P.E.
Regional Director
Northern Region

Submitted on Behalf of:

BROWN CONSTRUCTION, INC.

MEMORANDUM IN SUPPORT OF BID PROTEST

Kotzebue Airport Project
A.I.P. No. 3-02-0160-04
Project No. 60434
1987

Grant E. Watts
WADE & DE YOUNG
310 K Street, Suite 410
Anchorage, Alaska 99501
(907) 279-3544

Attorney for Brown Construction, Inc.

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OCT 07 1987
ASSOC. GENERAL COUNCIL

1 (9) to expend money for a community pur-
2 pose, facility, or service for the good of the
3 municipality to the extent the municipality is
4 otherwise authorized by law to exercise the
5 power necessary to accomplish the purpose or
6 provide the facility or service;

7 * * *

8 (11) to borrow money and issue evidences of
9 indebtedness.

10 Id. (Emphasis added).

11 AS 29.35.250 provides in pertinent part:

12 (a) A city inside a borough may exercise any
13 power not otherwise prohibited by law.

14 Id. (Emphasis added).

15 It is axiomatic that the City of Kotzebue cannot violate the
16 Constitutional and Statutory law governing the exercise of power
17 by a second class city. Any express prohibition curtailing the
18 power of a City, such as Kotzebue, must be adhered to and
19 respected. In the present case, the City of Kotzebue is ex-
20 pressly prohibited by the Constitution of Alaska and Statutory
21 mandate from participating in a private enterprise which seeks
22 profit as an overall goal.

23 I. THE USE OF FUNDS FROM THE CITY OF KOTZEBUE IS AN
24 UNLAWFUL LENDING OF CREDIT TO A PRIVATE COPORATION

25 The City of Kotzebue has provided at least one-third of the
26 \$50,000 bid bond which has been submitted to the DOT/PF on be-
half of the Joint Venture. See Exhibit A. The Joint Venture
partners include: City of Kotzebue, K.I.C., Inc. and R & S
Stores, Inc. The private joint venture has two participants

1 that are private corporate entities, i.e. KIC and R&S Store
2 Inc. The City of Kotzebue cannot "pledge" its credit on behalf
3 of a private joint venture. The prohibition against such acts
4 is provided in AS 37.10.085, which states:

5 Financial aid to corporations by state or po-
6 litical subdivision. Neither the state nor a
7 political subdivision of the state may

8 (1) make a subscription to the capital
9 stock of a corporation;

10 (2) lend its credit for the use of a corpo-
11 ration; or

12 (3) borrow money for the use of a corpora-
13 tion.

14 Id. (Emphasis added).

15 At the present time, there is no guarantee that a commer-
16 cial surety will provide a surety bond to this particular Joint
17 Venture at all. The Joint Venture has two options, either sup-
18 ply a commercial surety bond, or two individual sureties to pro-
19 vide the amounts required by AS 36.25.010. The Joint Venture is
20 apparently trying to secure a bond through a commercial surety.
21 The Joint Venture partners have each agreed to pay 1/3 of the
22 total price required by the commercial surety to supply the
23 bond. Thus, if a surety agrees to bond the Joint Venture, the
24 City of Kotzebue will assume responsibility for indemnifying the
25 surety for either 1/3 or all of any amounts paid out of the pay-
26 ment and/or performance bonds. The City of Kotzebue will act as
a source of indemnification for acts of any participant in the
Joint Venture should the surety ultimately pay out funds from

MEMORANDUM IN SUPPORT OF BID PROTEST
Page 3

1 the payment and performance bond. The indemnification would
2 also cover any indebtedness to the surety which is brought about
3 solely by the other private corporate Joint Venture partners.
4 The City of Kotzebue is essentially "loaning its credit" to the
5 private corporate partners by indemnifying the surety and
6 assuming the risk associated with prospective liability in the
7 future. The possibility that the City of Kotzebue may only be
8 indemnifying 1/3 of any amount which may ultimately be sought by
9 the surety is irrelevant. If the City of Kotzebue provides \$1.00
10 of its credit for the use of any corporation, AS 37.10.080 is
11 violated. In the present case, the bond requirement would be
12 \$716,600.00 for the payment bond and an additional \$716,600.00
13 for the performance bond or a total bond amount of
14 \$1,433,200.00. Thus, the City of Kotzebue is lending a credit of
15 \$477,733.00 for the benefit of two private corporate joint ven-
16 ture partners. This is nearly half a million dollars for pro-
17 spective indemnification of the surety. K.I.C. and R & S
18 Stores, Inc. ultimately benefit by being absolved of this pro-
19 spective liability. Thus, \$477,733.00 of "public monies" is
20 pledged for the benefit of a private "corporation."

21 The \$1,433,200.00 figure is reached by taking 40% of the
22 amount of the contract award - \$1,791,501.00 i.e. amount bid by
23
24
25

26 MEMORANDUM IN SUPPORT OF BID PROTEST
Page 4

1 KIC/City of Kotzebue/R & S Stores, Inc. x 2. One-third of
2 \$1,433,200.00 is \$477,773.00. AS 36.25.010 provides:

3 Bond of contractors for public buildings or
4 works. (a) Except as provided in AS
5 44.33.300, before a contract exceeding
6 \$100,000 for the construction, alteration, or
7 repair of a public building or public work of
8 the state or a political subdivision of the
9 state is awarded to a general or specialty
10 contractor, the contractor shall furnish to
11 the state or a political subdivision of the
12 state the following bonds, which become bind-
13 ing upon the award of the contract to that
14 contractor:

15 (1) a performance bond with a corporate
16 surety qualified to do business in the state,
17 or at least two individual sureties who shall
18 each justify in a sum equal to the amount of
19 the bond; the amount of the performance bond
20 shall be equivalent to the amount of the pay-
21 ment bond;

22 (2) a payment bond with a corporate surety
23 qualified to do business in the state, or at
24 least two individual sureties who shall each
25 justify in a sum equal to the amount of the
26 bond for the protection of all persons who
supply labor and material in the prosecution
of the work provided for in the contract; when
the total amount payable by the terms of the
contract is not more than \$1,000,000, the pay-
ment bond shall be in a sum of one-half the
total amount payable by the terms of the con-
tract; when the total amount payable by the
terms of the contract is more than \$1,000,000
and not more than \$5,000,000, the payment bond
shall be in a sum of 40 percent of the total
amount payable by the terms of the contract;
when the total amount payable by the terms of
the contract is more than \$5,000,000, the pay-
ment bond shall be in the sum of \$2,500,000.

(b) This section does not limit the authority
of a contracting officer to require a perfor-
mance bond or other security in addition to
those, or in cases other than the cases spe-
cified in (a) of this section.

MEMORANDUM IN SUPPORT OF BID PROTEST

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(c) When no payment bond has been furnished the contracting department shall not approve final payments to the contractor until the contractor files a written certification that all persons who supplied labor or material in the prosecution of the work provided for in the contract have been paid.

Id.

The City of Kotzebue would be indemnifying 1/3 of that amount. A similiar result would occur if the City of Kotzebue provided an individual surety bond. AS 37.10.085 is violated if the Joint Venture procures a commercial bond under the terms which have been mentioned above. The DOT/PF should also verify whether or not any bond holder designated by the Joint Venture is licensed to do business in Alaska. In addition, the indemnification by the City of Kotzebue could very well increase should the C.O. decide to require additional security for this project.

The impropriety of such acts by a city is described in Port Of Longview, Cowlitz Cty. v. Taxpayers, Etc., 527 P.2d 263

(Wash. 1974) in which the court stated:
The loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit.

* * *

It is not material what such undertakings may be called, or what forms are devised to conceal their main purpose, or how worthwhile they may appear to be, when the question of constitutionality is presented, their substance will be examined. The financing of private enterprises with public funds is

1 foreign to the fundamental concepts of our
2 constitutional system. To permit such en-
3 croachments upon the prohibitions of the Con-
4 stitution would bring about, as experience and
5 history have demonstrated, the ultimate
6 destruction of the private enterprise system.

7 Id. at 269, 271.

8 In Cole v. City of La Grange, 5 S. Ct. 416 (January 5, 1885),
9 the court analyzed a statute similiar to AS 37.10.085 and stated
10 as follows:

11 Otherwise, as it makes no provision for com-
12 pensation except when the use is public, it
13 would permit private property to be taken or
14 appropriated for private use without any com-
15 pensation whatever. It is true that this
16 article regards the right of eminent domain,
17 and not the power to tax; for the taking of
18 property by taxation requires no other compen-
19 sation than the tax-payer receives in being
20 protected by the government to the support of
21 which he contributes. But, so far as respects
22 the use, the taking of private property by
23 taxation is subject to the same limit as the
24 taking by the right of eminent domain. Each
25 is a taking by the state for the public use,
26 and not to promote private ends.

27 Id. at 419.

28 In Giles v. City of Biloxi, 112 So.2d 815 (Miss. 1959), the
29 court stated:

30 It is argued that the contract constitutes a
31 joint venture between the Commission, an
32 agency of the City of Biloxi, and Aponaug, a
33 private corporation, and that such joint
34 undertaking is invalid as being a loan of
35 municipal credit to the private corporation.

36 * * *

37 In 37 Am.Jur., Municipal Corporations, Section
38 135, page 751, it is said: "It is generally

1 held, however, that a contract whereby a muni-
2 cipal corporation engages jointly with a pri-
3 vate individual or corporation in the con-
4 struction of an improvement for joint use is
5 invalid as being a loan of the municipal
6 credit for private benefit."

7 Although many states have constitutional
8 provisions similar to Section 183, there does
9 not appear to have been any great amount of
10 litigation on the subject.

11 In a case involving a similar provision in the
12 Ohio Constitution, the Ohio court said
13 in Wyscaver v. Atkinson, 37 Ohio St. 80, that,
14 "The mischief which this section interdicts is
15 a business partnership between a municipality
16 or subdivision of the state and individuals or
17 private corporations or associations. It
18 forbids the union of public and private
19 capital or credit in any enterprise whatever.
20 * * * And I will add that it makes no
21 difference whether the scheme for the union of
22 public and private money or credit originates
23 with the party or parties representing the
24 public or the private interests. In short,
25 the thing prohibited is the combination in any
26 form whatever of the public funds or credit of
any county, city, town, or township with the
capital of any other person, whether
corporated or unincorporated, for the purpose
of promoting any enterprise whatever."

* * *

18 We hold that the contract between the
19 Commission and Aponaug is void.

20 Id. at 822, 823

21 In Whelan v. New Jersey Power & Light Company, 212 A.2d 136,
22 141, (N.J. 1965) the court stated:

23 [S]uch cases seemingly mean that, however
24 public the purpose and however defensible the
25 use of public funds to achieve it through
26 arrangements with private sources, still the
arrangement may not take the form of a

1 partnership or joint enterprise involving
2 either a sharing of the underlying ownership
or a sharing in the operating experience.

3 Id. at 142.

4 14 A.L.R. 1152, provides:

5 The authorities are quite generally
6 agreed that statutes expressly authorizing the
7 use of public funds in the carrying on of
8 enterprises of a private nature, or in
9 assisting such an enterprise or business by
10 making loans or subscribing for capital stock,
11 are invalid, at least in the absence of a
12 constitutional provision authorizing it. The
13 following cases, which for the purpose of this
14 proposition proceed upon the assumption that
15 the purpose was a private one, support this
16 general rule: [citations omitted] . . . The
17 promotion of the interests of individuals,
18 either in respect of property or business,
19 although it may result incidentally in the
20 advancement of the public welfare, is, in its
21 essential character, a private and not a pub-
22 lic object. However certain and great the
23 resulting good to the general public, it does
24 not, by reason of its comparative importance,
25 cease to be incidental. The incidental
26 advantage to the public, or to the state,
which results from the promotion of private
interests, and the prosperity of private
enterprises or business, does not justify
their aid by the use of public money raised by
taxation, or for which taxation may become
necessary. It is the essential character of
the direct object of the expenditure which
must determine its validity, as justifying a
tax, and not the magnitude of the interests to
be affected, nor the degree to which the gen-
eral advantage of the community, and thus the
public welfare, may be ultimately benefited by
their promotion. The principle of this dis-
tinction is fundamental. It underlies all
government that is based upon reason rather
than upon force.

1 Id. at 1153, 1154.

2 56 Am.Jur.2d Municipal Corporations § 579 provides:

3 A state legislature can neither compel
4 nor authorize a municipal corporation to
5 expend any of its funds for a private purpose,
6 and consequently, since practically every
7 undertaking of a municipality does or may
8 require the expenditure of money, a municipal
9 corporation cannot, even with express
10 legislative sanction, embark in any private
11 enterprise, or assume any function which is
12 not in a legal sense public. If there is any
13 restriction implied and inherent in the spirit
14 of American constitutions, it is that the
15 government and its subdivisions shall confine
16 themselves to the business of government for
17 which they were created, but if a specific
18 provision prohibiting the expenditure of
19 public funds for private purposes is required,
20 it is found in the clause which forbids the
21 taking of property for other than public uses;
22 for since the funds of a municipality are
23 necessarily directly or indirectly raised by
24 taxation, the expenditure of money by a
25 municipality for private purposes does or may
26 necessarily result in the taking of the
property of individuals under the guise of
taxation for other than public uses. In such
a case it can make no difference that the
payment of municipal funds for private
purposes is to be made out of borrowed money,
and that no immediate provision for taxation
is made. So also, it can make no difference
that the money to be devoted to a use not
public is derived from a specified source
which is not public. If the funds from such
source are public funds and subject to such
public use as the municipality may see fit to
devote them, their use for a private purpose
increases the burden of taxation as certainly
as if a tax for a private purpose was directly
levied.

24 Id. at 628, 629.

25 [T]he rule that municipal corporations must
26 exercise their powers for public purposes is
nowhere more strictly applied than in the case

1 of borrowing money and otherwise incurring in-
2 debtedness. The legislature may not consti-
3 tutionally authorize a municipal corporation
4 to contract debts for private objects. In
5 some jurisdictions, municipalities are ex-
6 pressly prohibited by constitutional, statu-
7 tory, or charter provision from incurring in-
8 debtedness except for municipal purposes.

9 Id. at 632.

10 The City's participation in the Joint Venture Agreement
11 provides for additional "use of the City's credit" for the bene-
12 fit of private corporations in the Joint Venture. Provisions
13 (2.0),(2.1),(2.2),(2.3), (2.4), and (3.6) make it evident that
14 the City obligates public funds for contingent liability between
15 the Joint Venture partners. See Exhibit B. The DOT/PF should
16 also review the remainder of the JV provisions in order to fully
17 understand the extent of the City's proposed participation.

18 JV provision 2.1 provides,

19 2.1 All necessary working capital, subject to
20 the provisions of paragraphs 2.3 and 6.2, when
21 and as required for performance of the joint
22 venture, shall be furnished by the parties
23 according to the following schedule:

24 City of Kotzebue	33 1/3%
25 Kikiktagruk Inupiat Corp.	33 1/3%
26 R.S. Store, Inc.	33 1/3%

Working capital shall be held to the
minimum necessary. Whenever feasible and
economic, costs shall be met by allocations of
in kind contributions, treated as expenses,
made by the parties. The joint venture shall
have no employees and own no property outright
except as approved by the committee or requir-
ed by the bid. With the approval of the com-

1 mittee, the manager may designate one of the
2 parties to hire new personnel or purchase or
3 lease equipment required specifically for the
4 project according to the requirements of the
5 project and the distribution of, contributions
6 required by this agreement.

7
8 JV provision 2.2 provides:

9 2.2 The interest of the parties in the joint
10 venture and in all property, materials, and
11 equipment acquired in connection therewith and
12 held by it, and in all profits and losses in-
13 curred in the performance of the project and
14 losses incurred in the performance of the pro-
15 ject shall also be in accordance with the per-
16 centages set forth above.

17
18 JV provision 2.3 provides:

19 2.3 If, at any time any party, after reason-
20 able notice, fails to contribute its share of
21 project requirements in either working capital
22 or in kind contributions, the party or parties
23 not in default may require that the allocation
24 of profits be changed to be proportionate in
25 kind contributions actually made; provided,
26 that the parties shall continue to share in
 losses according to the original schedule.
 The parties have agreed to provide the funds
 and assets necessary for mobilization under
 the project through their own payrolls, which
 contributions shall be treated as in lieu con-
 tributions.

 JV provision 2.4 provides:

 2.4 The manager shall give adequate notice of
 the schedule of requirements for cash, ser-
 vices, equipment, property and materials re-
 quired for performance of the project. In the
 event that a cash requirement in excess of
 Fifty Thousand Dollars (\$50,000.00) is not met
 by a party, the cash may be advanced by another
 party at an allocated interest rate of
 12.5% per annum or the cost of the funds,
 whichever is greater, chargeable to the party
 not advancing the funds, with the consent of
 the committee. In the event that a party does

MEMORANDUM IN SUPPORT OF BID PROTEST

Page 12

1 not adequately meet an in kind contribution
2 assigned to it, the committee may reassign the
3 responsibility for making the in kind contri-
4 bution and may assess the cost of delay
5 against the party not providing its timely in
6 kind contribution, or it may determine that
7 the party is in default under this agreement.

8 JV provision 3.6 provides:

9 3.6 Except as otherwise agreed by the commit-
10 tee, subject to the availability of personnel
11 and equipment and as required in the opinion
12 of the manager of the project the parties
13 shall make approximately equal contributions
14 of personnel, equipment, materials and pro-
15 perty, herein referred to as "in kind" contri-
16 butions to the project. Before any in kind
17 contribution is committed to the project, the
18 committee shall approve an hourly or other
19 rate or cost schedule for the contribution as
20 proposed by the manager. Such a rate schedule
21 may include costs of payroll, insurance, taxes
22 and other overhead costs deemed reasonable.

23 The provisions mentioned above violate the statutory prohibition
24 provided in AS 37.10.085.

25 II. THE PARTICIPATION OF THE CITY OF KOTZEBUE MAY VIOLATE
26 ARTICLE IX, § 9 OF THE ALASKA CONSTITUTION.

The City of Kotzebue has provided 1/3 of the \$50,000 bid
bond for the project. The City will also incur 1/3 of the costs
associated with procuring a payment and performance bond, in the
event a surety can actually be found to supply the bonding. The
prospective liability which the City would assume through indem-
nification of the surety could reach \$477,733.00 or more. This
sum could increase if common law principles of indemnity are
ultimately pursued in the future. The City of Kotzebue could be
put in the position of utilizing its own indebtedness to finance

MEMORANDUM IN SUPPORT OF BID PROTEST
Page 13

1 its participation in the Joint Venture. The Constitution of
2 Alaska, Art. IX, § 9 provides:

3 Local Debts. No debt shall be contracted by
4 any political subdivision of the State, unless
5 authorized for capital improvements by its
6 governing body and ratified by a majority vote
of those qualified to vote and voting on the
question.

7 Id.

8 There is no "capital improvement" involved or resulting
9 from the City of Kotzebue participating in a construction
10 contract for a project already funded with State and Federal
11 dollars. In City of Juneau v. Hixson, 373 P.2d 743 (Alaska
12 1962), the court described capital improvement as follows.

13 There is nothing in the history of
14 municipal bonding in Alaska, or in the minutes
of the Constitutional Convention that causes
15 us to believe that the term "capital
improvements" was intended to denote projects
16 radically different than those for which
municipalities had been permitted to incur
17 bonded indebtedness in the past. We believe
"capital" was used in the sense in which it is
18 associated with assets in the form of real or
personal property and that it was intended to
19 connote a degree of permanency. We believe
that it includes the "public works of a
20 permanent character" such as "streets,
bridges, wharves and harbor facilities, sewers
21 and sewage-disposal plants, municipal
buildings, schools, libraries, gymnasias and
22 athletic fields, fire houses, and public
utilities" as mentioned in the original act of
Congress. It includes "off-street parking
23 facilities" and "public works or facilities of
a permanent character" as provided in recent
24 acts of the state legislature. We believe
that in selecting the term "capital
25 improvements" the convention had in mind that

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1 it was including all the projects just
2 mentioned which had historically been as-
3 sociated with municipal bonding, but under a
4 better generic term-one which did not require
5 illustration by actually listing the type pro-
6 jects that were considered to be included
7 within its meaning and stating that the list
8 itself was not exclusive as was done in the
9 original act of Congress.

10 Id. at 747 (footnotes omitted).

11 The City retains no "tangible asset" for all the money which
12 could be expended in participating in a "private enterprise."
13 The City actually stands to loose a great deal without retaining
14 a single tangible asset for the sacrificed "public funds." The
15 "public funds" relied on by the City in participating in the
16 Joint Venture ultimately aid only the Joint Venture partners,
17 and then only if the contract is performed in a flawless man-
18 ner. The Joint Venture is merely participating to perform the
19 work associated with constructon of a State-operated airport.
20 The use of public funds by the City of Kotzebue is being
21 utilized to facilitate work which is traditionally performed by
22 the private sector. The voters have not had a voice in dis-
23 cussing the propriety of indemnifying a private commercial sure-
24 ty, and even if they had, the absence of any capital improvement
25 for the debt incurred is clearly violative of the Alaska Con-
26 stitution.

27 The City has contracted a "debt" by assuming responsibility
28 as an indemnitor on the payment and performance bonds, in the
29 event the surety actually accepts the arrangement. Although

1 this is not a situation where the City has issued bonds to
2 secure funds, it can be analogized since the City is relying on
3 tax dollars to pay off any indemnification of the surety which
4 may come to pass in the future. The City of Kotzebue did not
5 put this issue before the voters i.e. taxpayers, prior to enter-
6 ing into any agreement which mandates indemnification by the
7 municipality. The surety arrangement with the City and other
8 Joint Venture partners results in a situation similiar to a
9 municipality issuing a general obligation bond; only in this
10 case, no capital improvement is gained, although the City is
11 definitely obligated. The legislation provided in AS 29.47.180
12 and AS 29.47.190 can be analogized to the present financial
13 realities which the City must face. AS 29.47.180 provides:

14 General obligation bonds. A municipality may
15 acquire, construct, improve, and equip capital
16 improvements and issue negotiable or nonnegoti-
17 able general obligation bonds for these pur-
18 poses.

19 Id. AS 29.47.190 provides:

20 Vote and notice of existing indebtedness re-
21 quired. (a) A municipality may incur general
22 obligation bond debt only after a bond authori-
23 zation ordinance is approved by a majority vote
24 at an election. Any municipal voter may vote
25 in the bond election, except as otherwise pro-
26 vided by law.

27 (b) Before a general obligation bond issue
28 election, the governing body shall have pub-
29 lished a notice of the total existing bond in-
30 debtedness at least once a week for three con-
31 secutive weeks. The first notice shall be

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1 published at least 20 days before the date of
2 the election. A notice shall include

3 (1) the current total general obligation
4 bonded indebtedness, including authorized but
5 unsold bonds of the municipality;

6 (2) the cost of the debt service on the cur-
7 rent indebtedness;

8 (3) the total assessed value of property in
9 the municipality.

10 Id.

11 It is Brown's contention that the actions of the City in
12 "indemnifying" a commercial security violates the mandate of
13 AS 29.47.190 since voter participation is absent.

14 III. THE CITY OF KOTZEBUE FULFILLS NO PUBLIC PURPOSE BY
15 PARTICIPATING IN A PRIVATE JOINT VENTURE.

16 Art. IX, § 6 of the Alaska Constitution provides that:

17 No tax shall be levied, or appropriation of
18 public money made, or public property
19 transferred, nor shall the public credit be
20 used, except for a public purpose.

21 Id.

22 The participation of the City of Kotzebue in a joint
23 venture for the performance of a construction contract violates
24 this provision. The City of Kotzebue has embarked in a joint
25 venture for profit. In Wright v. City of Palmer, 468 P.2d 326
26 (Alaska 1970), the court considered the parameters of the term
"public purpose" and stated:

[T]he test which we must apply is whether the
plan is so unreasonable as to transgress the
limitations of our constitution. If the plan
of action were plainly foolhardy, or if it
amounted to the pledging of credit or the
giving away of assets without any correspond-
ing discernible benefit, we might be per-
suaded to strike down the plan.

1 Id. at 331.

2 The City of Kotzebue cannot designate the hiring of private
3 individuals from Kotzebue as the basis for finding a "public
4 purpose. Addendum 4 of the Kotzebue Airport Project provides,

5 NOTICE TO BIDDERS.

6 Regarding employment of labor, there are
7 indications from the FAA that the hiring pre-
8 ference for local residents announced August
9 20, 1987 is not enforceable on this type of
10 project. Bidders should therefore assume
11 employment preference regulations do not apply
12 to this project

13 The City of Kotzebue is apparently making an attempt to
14 circumvent Addendum 4 and insure the hiring of local residents
15 by entering the construction business. This is not a valid pub-
16 lic purpose for committing a substantial public funds. A
17 "public purpose" of this nature would allow any political sub-
18 division of the State to bid on public works to insure employ-
19 ment of local residents, under the guise of a profit-seeking
20 joint venture. Furthermore, there is no evidence that the local
21 residents will not be hired if a non-municipal contractor is
22 awarded the contract. The invalidity of such acts is described
23 in 14 A.L.R. 1155, which provides in pertinent part,

24 It also has been held that a legislative
25 authorization that public funds be used in a
26 business of a private nature cannot be
justified on the theory that the state power
to tax is the same as the limits of the police
power of the state.

27 Id. at 1155.

1 [T]rade is not, and cannot properly be,
2 regarded as one of the functions of
3 government. On the contrary, its function is
4 to protect the citizen in the exercise of any
5 lawful employment, the right to which is
6 guaranteed to the citizen by the terms of the
7 Constitution, and certainly has never been
8 delegated to any department of the
9 government. We do not deem it necessary to go
10 into any extended consideration of the fearful
11 consequences of recognizing the power of the
12 legislature to embark the state in any trade,
13 arising from the hazards of all business of
14 that character, or to comment upon the danger
15 to the people of the monopoly of any trade by
16 the state,--for if it can monopolize one it
17 may monopolize any or all other trades or
18 employments,--although it is permissible for a
19 court, when called upon to construe an act, to
20 consider its effects and consequences; for it
21 may be said--indeed, has been said--that the
22 good sense and patriotism of the members of
23 the general assembly may be safely relied upon
24 to protect the people from such apprehended
25 dangers. But that great luminary of the law,
26 Chief Justice Marshall, did not seem to think
that this was a sufficient protection, as may
be seen by what he said in *M'Culloch v.*
Maryland.

Id. at 1157-1158

In the case of Burns v. Essling, 194 N.W. 404 (Minn. 1923), the
court concluded that the city's use of funds for a hockey rink
which benefitted only a few select individuals was an
inappropriate use of public funds. The court stated,

[I]t is well settled that, if the primary
object of an expenditure of municipal funds is
to subserve a public purpose, the expenditure
is legal, although it may also involve as an
incident an expenditure which, standing alone,
would not be lawful. It is equally well
settled that, if the primary object is to pro-
mote some private end, the expenditure is
illegal, although it may incidentally serve
some public purpose also.

1 Id. at 405 (emphasis added).

2
3 The primary objective of the Joint venture is seeking
4 profit for a private enterprise. The "public" receives no
5 discernable benefit for the overall liability that is assumed
6 by the City. At best, an unknown number of individuals receive
7 wages which cannot be said to benefit the "public." The City
8 "gambles" and receives little, if anything in return. Brown
9 maintains that the City of Kotzebue's participation in the Joint
10 Venture Enterprise has the overall result of giving away assets
11 without any discernible benefits to the public. The City of
12 Kotzebue is clearly pledging its credit for the use of private
13 concerns and this transgresses the Alaska Constitution. In
14 DeArmond v. Alaska State Development Corporation, 376 P.2d 717,
15 721 (Alaska 1962) the court stated,

16 Appellant's first point is that the
17 appropriation of funds for the corporation and
18 the issuance of debenture certificates by the
19 corporation constitutes the transfer of public
20 funds and the use of public credit for other
21 than a public purpose, in violation of article
22 IX, section 6 of the Alaska Constitution which
23 states:

24 "No tax shall be levied, or appropriation
25 of public money made, or public property
26 transferred, nor shall the public credit
be used, except for a public purpose."

At the outset we observed that the phrase
"public purpose" represents a concept which is
not capable of precise definition. We believe
that it would be a disservice to future
generations for this court to attempt to
define it. It is a concept which will change

1 as changing conditions create changing public
2 needs. Whether a public purpose is being
3 served must be decided as each case arises and
4 in the light of the particular facts and
5 circumstances of each case.

6 Id. at 721.

7 The fact that the City is participating in the performance
8 of a construction contract and the circumstances which establish
9 that public funds are being utilized to promote a private enter-
10 prise, i.e. loan public funds for private gain.

11 IV. THE JOINT VENTURE'S BID SHOULD BE DISQUALIFIED IN THE
12 BEST INTEREST OF THE STATE OF ALASKA.

13 Information to Bidders, provides at pages 4 and 5:

14 The Department reserves the right to reject
15 any and all bids when such rejection is in the
16 best interest of the State;...to reject the
17 bid of a bidder who is not , in the opinion of
18 the Contracting Officer, in a position to
19 perform the contract;. . . .

20 The City of Kotzebue is arguably in no position to participate
21 in the JV which intends to perform the contract. As the DOT/PF
22 is well aware, the circumstances surrounding the disappearance
23 of the gravel which was to be used for the Kotzebue Airport may
24 make it "inappropriate" to award any contract to the City of
25 Kotzebue. See Exhibit E. The State of Alaska paid the City of
26 Kotzebue \$150,000 for gravel as part of a previous settlement
agreement. See, Exhibit D. This agreement also requires the
State of Alaska to provide additional funds based on a formula
which is calculated on the basis of Bid Items from the Kotzebue
Airport Contract bid submittals. The formula designated under

1 4(b) of the settlement agreement makes it apparent that an
2 additional \$113,400 is currently owed if the agreement is
3 performed as stated. The City of Kotzebue would receive a total
4 of \$263,400 for the gravel which was to be used for the
5 construction project. It is clear that the Bid Item #3 supplied
6 by the City of Kotzebue increases the overall amount which the
7 State of Alaska must pay as provided in the "market value
8 formula. The figures for Bid Item #3 submitted by the three
9 lowest contractors were: City of Kotzebue \$8.78; Brown \$7.50;
10 Knik \$7.00. The calculations as provided in settlement
11 agreement 4(b) result in \$3.78 market value additive per cubic
12 yard of gravel x 30,000. The City of Kotzebue has been given
13 the opportunity to supply that number by engaging in the
14 competitive bid process for the Kotzebue Airport Project.

15 The fact remains that the State of Alaska remains liable
16 for payment on gravel which has subsequently disappeared, in
17 part. It has been alleged that the City of Kotzebue is
18 responsible for the disappearance of gravel from the stockpile.
19 If this ultimately proves to be true, it is not in the best
20 interest of the State to have the City of Kotzebue participating
21 in a contract awarded by the DOT/PF, especially if no
22 constitutional basis exists to allow for it in the first
23 instance. The State could very well end up litigating against
24 the party which is performing the DOT/PF contract. If the City
25

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1 of Kotzebue is responsible for the disappearance of the gravel,
2 their acts increased the overall cost of the project. Bid Item
3 #2 was increased to 75,000 cubic yards to make up for the
4 disappearance of gravel from the stockpile previously designated
5 for the project. It is totally inappropriate for the City of
6 Kotzebue to gain two windfalls: (1) being paid for gravel which
7 is not actually in the stockpile; and (2) making additional
8 profits on the increased amounts of Bid Item #2, i.e. dredge and
9 place 75,000 cubic yards of gravel, if responsibility is
10 attributed to the municipality. The taxpayers of the State of
11 Alaska should not be required to reward behavior which results
12 in needless added costs for a "public contract."

13 In addition, the participation of a city in a Joint Venture
14 or private enterprise lends itself to the appearance of impro-
15 priety. The mixing of private and public funds makes it more
16 difficult for the general public to oversee the business of
17 government. Further complications arise because: (1) the City
18 cannot provide any materials or supplies which were procured
19 with tax-exempt public funds; and (2) the Freedom of Information
20 Act does not carry over into the private sector of the business
21 world. Intermingling of city-owned equipment, personnel, etc.
22 with private enterprise provide "fertile ground" for "conflicts
23 of interest" and other decimations of the public confidence in
24 government. The taxpayer's are not benefited by having to pay
25

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1 for construction bonding, licensing, insurance etc., or having
2 to bear the burden of indemnifying a private surety. The laws
3 governing the power that a city can properly exercise were
4 enacted to protect the citizens from government misuse of funds.

5 a. Interference with the Competitive Bid Process.

6 The participation of the City of Kotzebue in a private enter-
7 prise for profit disrupts the entire competitive bid system.
8 The City has embarked into uncharted water which have tradi-
9 tionally been navigated by the private sector. A political sub-
10 division of the state has no "business" competing with the pri-
11 vate enterprise. Normally, it is the state or political sub-
12 divisions which accept bids and award contracts under competi-
13 tive bid regulations. The competitive bid system will be
14 destroyed if an entity of the government is allowed to partici-
15 pate against the private sector. If a precedent is set which
16 allows such participation, it would allow a government entity to
17 bid on the very contracts it puts out for bid and award to the
18 general public. A "precedent" of this nature would allow any
19 and every government entity to participate in the competitive
20 bid process so long as any public purpose, i.e. hiring of local
21 residents, could be shown. The flip side to such a proposition
22 is the disservice which results to the "public." A contractor
23 may eventually be "competing" against the government in the very
24 city in which he resides. A private contractor cannot possibly

25
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1 compete with a political subdivision in bidding on construction
2 projects. The private contractor must rely on paying his own
3 funds for licensing, bonding, equipment, etc. without the bene-
4 fit of relying on public funds to meet those needs. A city, on
5 the other hand, meets those needs by relying on public equip-
6 ment, public employees, public funds etc. The contractors who
7 are Alaska taxpayers could very well end up financing their com-
8 petitors, i.e. Government participation in future construction
9 project endeavors. If the City of Kotzebue is allowed to par-
10 ticipate in the construction business under the guise of the
11 public interest, where will it end? If such behavior is
12 allowed, no prohibition would stop a city such as Kotzebue from
13 entering into a "Joint Venture" for a McDonald's Restaurant or
14 some other enterprise which is essentially "private." Private
15 contractors will probably quit bidding on public projects all
16 together if they are forced to compete economically against the
17 governments they support. If a precedent is set along the lines
18 mentioned above, irreparable harm will come to Brown and other
19 private contractor's within the State of Alaska.

20 b. Competitive Advantage Over Other Private Contractors.

21 The participation of the municipality results in an unfair ad-
22 vantage over other contractors bidding on the Kotzebue Airport
23 Project. The City of Kotzebue designated \$146,000 for Pay Item
24 100, i.e. Mobilization And Demobilization. The second and third
25

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1 low bidders provided figures for Pay Item 100 as follows: (1)
2 Brown - \$389,000.00; and (2) Knik - \$460,000.00. See Exhibit
3 C. The wide variance results from the proposed use of City-
4 owned equipment on the Kotzebue Airport Project. The Joint
5 Venture benefits by being able to utilize equipment provided by
6 the City. The other contractors must rely on traditional
7 methods of transporting equipment to and from the job site. If
8 this had been a Kotzebue based contractor providing the equip-
9 ment, it might be acceptable as part of the competitive bid
10 process, but such is not the case. The Joint Venture does bene-
11 fit by including the City as a participant at an extreme advan-
12 tage over other private contractors. The Joint Venture is 10
13 less than \$245,000 below the next bid. Thus, a \$245,000 advan-
14 tage is evidenced on this singular item alone. The use of
15 City-owned equipment etc. would result in an additional advan-
16 tage since the maintenance etc. are not incurred to the same
17 degree as a private owner. The City has already gained a cer-
18 tain economic advantage by receiving money for stockpiling
19 gravel on the project which could carry over into its ability to
20 provide a lower bid on the Kotzebue Airport Project. Since the
21 City had entered into the settlement agreement prior to submit-
22 ting a bid, the ability to weigh the overall economics in com-
23 puting a bid was clearly enhanced. The other private contrac-
24 tors were also put at a disadvantage by the fact that neither
25

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1 the City or other Joint Venture partners appeared on the plan-
2 holder list. Brown would not have gone to the expense of pre-
3 paring a bid if the participation of the City of Kotzebue had
4 been known prior to submission of bids. The DOT/PF should
5 ascertain the specifics regarding each pay item that the City
6 plans to provide so the exact figures on economic advantage can
7 be determined. The overall amount of economic advantage enjoyed
8 by the City could very well affect its position as low bidder.
9 Other private contractors also do not enjoy the benefit of hav-
10 ing bonding and licensing costs provided by a municipal part-
11 ner. In the present Joint Venture Agreement, the City of
12 Kotzebue is obligated to pay 1/3 of the costs associated with
13 getting the proper General Contractor's License for one of the
14 private corporate partners in addition to its share of mobiliza-
15 tion costs. The State of Alaska Contractor Licensing Division
16 has no information on record which shows that "any" of the JV
17 partners is licensed at the present time. As the DOT/PF knows,
18 the costs associated with licensing is \$10,000.

19 V. CONCLUSION.

20 The DOT/PF has a duty to disqualify the bid submitted on
21 behalf of the Kotzebue/KIC/R & S Stores, Inc., Joint Venture.
22 The legal authority provided herein mandates such action by the
23 State of Alaska since both Statutory and Constitutional prohibi-
24 tions will be violated in the event the contract is awarded to
25

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1 the City of Kotzebue/KIC/R & S Stores, Inc., JV. The State of
2 Alaska has now been provided with the "Smoking Gun" which estab-
3 lishes the impropriety of the City's participation in the con-
4 tracting business.

5 Brown provided a proper responsive bid for the Kotzebue
6 Airport Project in accordance with the guidelines established by
7 the State of Alaska. Brown hereby requests that the Kotzebue
8 Airport Project be awarded to Brown Construction, Inc. since it
9 is the lowest responsive bid as reflected in the DOT/PF
10 records. It is in the best interest of the State of Alaska to
11 have a licensed Alaska contractor with a proven track record in
12 the construction industry perform a public works contract,
13 rather than accept a government participant who could wreak
14 havoc to private enterprise, the state, and the competitive bid
15 process. Please contact Brown Construction Inc. and Grant E.
16 Watts as soon as the DOT/PF renders a decision on this matter.

17 RESPECTFULLY SUBMITTED this 2nd day of October, 1987, from
18 Anchorage, Alaska.

19 WADE & DE YOUNG
20 (A Professional Corporation)
21 Attorneys for Brown Construction
22 Company

23 By Grant E. Watts
24 Grant E. Watts

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