

S B

4 2 4



**RESA JERREL**  
DIRECT OF GOVERNMENT RELATIONS

ALASKA CHAPTER  
ASSOCIATED GENERAL CONTRACTORS

134 N FRANKLIN ST. STE A  
JUNEAU ALASKA 99801  
586-1740



## UTILITY CONTRACTORS OF ALASKA, INC.

*Alaska Chapter of the National Utility Contractors Association*

P.O. Box 112628 • Anchorage, Alaska 99511-2628 • (907) 346-4731

April 4, 1988

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.' "

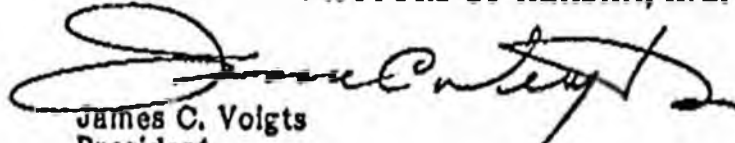
We disagree with this because the City of Kotzebue operates, in part, with state grants through which it can obtain construction equipment and maintenance facilities, at virtually little or no cost. This provides them with an unfair advantage over private contractors who can only obtain their equipment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



James C. Volgs  
President

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

JCV/mjm

# ALASKA STATE LEGISLATURE

*Home Address*  
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: Senator Tim Kelly, Chair  
Senate Labor & Commerce Committee

FROM: Senator Lloyd Jones

RE: Senate Bill 424

---

Senate Bill 424, An Act relating to procurement by the Department of Transportation and Public Facilities from certain entities, has been passed out of Senate Community & Regional Affairs Committee. The next committee of referral is Senate Labor & Commerce, which you chair.

I would appreciate having this bill scheduled for a hearing at the Committee's earliest convenience.

Jim Lottsfeldt of my staff is working with this legislation. Please feel free to have your staff work with him if you need additional back-up.

Thank you.

# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
TIM KELLY, Vice Chairman  
RICK HALFORD  
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

*Home Address*  
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.

## 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. 30.30.110 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. <sup>1/</sup> Contractor is defined as "the contractor including subcontractors performing work necessary to

<sup>1/</sup> 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  
Page #2  
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 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 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(b).

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

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  
BRU:  
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)

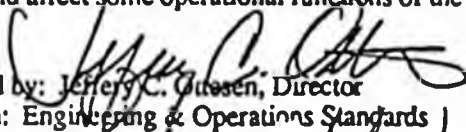
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

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. Grotzen, 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.



SKILL  
RESPONSIBILITY  
INTEGRITY

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

BOX 82500 • 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.

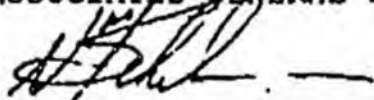
Commissioner Hickey  
Page 3

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

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES  
NORTHERN REGION, DESIGN AND CONSTRUCTION

STEVE COWPER, GOVERNOR

2301 Peyer Road  
Fairbanks, Alaska 99709-6394  
(907) 451-2200

October 22, 1987

Re: Project No. AIP 3-02-0160-04/60434  
Kotzebue Airport Improvements

NOTICE TO PROCEED

EXPRESS MAIL NO. B26617136  
RETURN RECEIPT REQUESTED

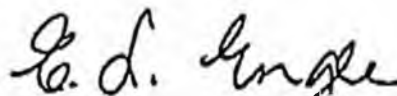
Kotzebue/K.I.C./R & S Store, Inc. J.V.  
P.O. Box 46  
Kotzebue, Alaska 99752

Gentlemen:

The Federal Aviation Administration has reviewed and approved the contract documents for the referenced project. You are hereby directed to proceed with the work called for under this contract. The effective date of this Notice to Proceed is October 22, 1987. Contract completion date is October 31, 1988.

Please address future correspondence to Ron Davena, Western District Engineering Manager, Department of Transportation & Public Facilities, P.O. Box 1048, Nome, Alaska 99762 or his designee.

Sincerely,



Elizabeth L. Engle, P.E.  
Director, Design and Construction  
Northern Region  
Contracting Officer

SPL/dv

RECEIVED  
OCT 26 1987  
Associated General Contractors

# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

STEVE COWPER, GOVERNOR

2301 FEDERAL ROAD  
FAIRBANKS, ALASKA 99700-6218  
PHONE: (907) 481-9210

October 12, 1987

Re: Kotzebue Airport Improvements  
Project No. 60434

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

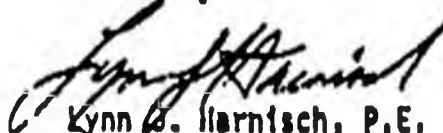
Kotzebue/KIC/R & S Stores, Inc., J.V.  
P.O. Box 46  
Kotzebue, Alaska 99762

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

hm

**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./K&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 Kotzebue (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 similar 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



SKILL  
RESPONSIBILITY  
INTEGRITY

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

BOX 92500 • ANCHORAGE, ALASKA 99508  
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 through 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.

DEC-22-87 TUE 17:20

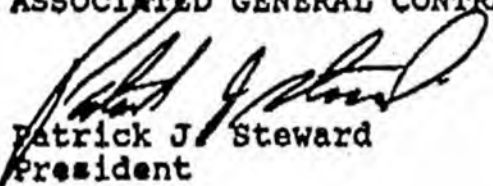
P.03

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

# 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 Schnaible  
Attorney General

SUBJECT: Municipality as gen-  
eral contractor for  
public works project

*Marty Rutherford*  
Thru: 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. <sup>1/</sup> Contractor is defined as "the contractor including subcontractors performing work necessary to

---

<sup>1/</sup> 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  
Page #2  
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 munic-

---

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.

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

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



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

March 9, 1988

Testimony

Senate Labor and Commerce Committee

SB 424: Procurement by the Department of Transportation and Public Facilities from certain entities.

Thank you Mr. Chairman. For the record my name is Resa Jerrel, and I am the Director of Governmental Relations for the Associated General Contractors of Alaska. We appreciated the opportunity to testify in favor of this legislation. I would like to give you the background on the need for this legislation.

Early last fall we encountered a situation that quite frankly we had not encountered before and it disturbed a lot of people in the construction industry.

The Department of Transportation and Public Facilities put out to competitive bid an airport improvement project, the bid opening was September 15th, and to a lot of people's surprise, the apparent low bidder of \$1.8 million was a Joint Venture consisting of a community, a village corporation and a Liquor Store.

On September 23rd we wrote the Department of Transportation registering our concern over the potential of them awarding the contract to such a Joint Venture. We were concerned over the concept of a community competing against private construction companies and believed that it was contrary to the principles of free enterprise. A community receives municipal assistance, revenue sharing, grants to purchase equipment, etc, from the state and quite simply a private company cannot compete with any community that is underwritten by state funds - it is indeed very, very unfair competition.

On October 22nd, the Fairbanks office of the Department of Transportation sent the Joint Venture a notice to proceed.

In November, at the annual convention of AGC, Commissioner Hickey indicated that the award to the Joint Venture was

based on an Attorney General opinion which in essence said that there was nothing in law to prevent the Department of Transportation from awarding the contract to the Joint Venture.

In December I called the Department of Transportation to obtain a copy of the Attorney General's opinion. Staff experienced difficulty in locating it. I called the Attorney General's office and requested that they look through their law opinion index for an Opinion issued in September or October under the subject of contracts, bids, contractors, communities or municipalities that would fit the situation. The only opinion they could find that addressed the issue of a community bidding on projects was dated April 7, 1987 and to my surprise it stated 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."

DOT/PF subsequently informed us that the Attorney General opinion, that their Fairbanks office had received was not in writing but was a verbal opinion.

As you might guess, we found these revelations and the potential of other communities bidding against private industry quite disturbing.

The question before you today, as policy makers is: As a matter of public policy are political subdivisions going to be allowed to competitively bid against the private sector?

If you have any questions I would be happy to answer them.