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LEGISLATIVE AFFAIRS AGENCY

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaskan
corporation,

Plaintiff,

Case No. 3AN-15-05969 CI

v.

716 WEST FOURTH AVENUE, LLC and
LEGISLATIVE AFFAIRS AGENCY,

Defendants.

LEGISLATIVE AFFAIRS AGENCY'S RESPONSE TO COURT'S REQUEST
DATED FEBRUARY 26, 2016

In response to the Court's February 26, 2016 Order, the Legislative Affairs Agency ("LAA") is not asking the Court to find the entire case to be nonjusticiable. When LAA engages in procurements, courts may generally interpret and apply the Procurement Code for some transactions without violating the separation of powers doctrine.¹ There are limits, however.

Some portions of the lease extension determination are nonjusticiable because of the "lack of judicially discoverable and manageable standards for resolving [the issue]" and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."² Here, the Legislature statutorily authorized the Legislative Council to adopt the Alaska Legislative Procurement Procedures (the "Procedures") to address the special needs of the Legislature.³ These Procedures require the Procurement Officer to make certain discretionary policy determinations. The responsibility for making these findings has been committed to the Legislative Council and it would be impossible for the Court to undertake an independent review of those findings without, in the words of the Alaska Supreme Court, "expressing a lack of respect for that [coordinate] branch of government."⁴ There are no "judicially discoverable and manageable standards"⁵ that may be used to resolve the questions of whether the reasons

¹ See, e.g., *State Center, LLC v. Lexington Charles Ltd. P'ship*, 92 A.3d 400, 421 (Md. Ct. App. 2014) (noting trial judge's rejection of state agencies' motion to dismiss on "political question" grounds where plaintiff's claims related to interpretation and implementation of state procurement laws); cf. AS 36.30.685.

² *Baker v. Carr*, 369 U.S. 186, 217 (1982); see also *Kanuk ex rel. Kanuk v. State, Dep't of Natural Res.*, 335 P.3d 1088, 1096-97 (Alaska 2014) (using the *Baker v. Carr* criteria to identify nonjusticiable political questions).

³ AS 36.30.020 (providing that the Legislative Council shall adopt procurement procedures that "must be adapted to the special needs of the legislative branch as determined by the legislative council"); *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728, 735 (Alaska 2006) (deference owed when Legislature is making policy determinations that require balancing various considerations).

⁴ *State, Dep't of Natural Res. v. Tongass Conserv. Soc'y*, 931 P.2d 1016, 1019 (Alaska 1997); see also *Kanuk*, 335 P.3d at 1099 (finding policy-based decisions are better reserved for agencies or the Legislature).

⁵ *Baker*, 396 U.S. at 217.

for the material modification were in the best interests of LAA, legitimate, or unforeseen to LAA when it first entered into the lease. Nor could the Court properly determine whether it was practicable for LAA to competitively procure a new lease because of the policy determinations inherent to such a decision.

Accordingly, the Court may not second-guess the Procurement Officer's determinations under the Procedures that:

- the reasons for a material modification (i.e., an expansion of the Legislative Information Office's physical footprint) of the lease were legitimate;
- the reasons for the modification were unforeseen when the original lease was entered into;
- it was not practicable to competitively procure a new lease; or
- the modification was in the best interests of the LAA.⁶

The application of the Procedures to these policy determinations is nonjusticiable.

Despite these limitations, LAA does not contend that the entire case is necessarily nonjusticiable because Plaintiff's request for declaratory relief could conceivably be limited to the lease extension's compliance or non-compliance with AS 36.30.083.⁷ If so, then no political question should be at issue. To the extent that the Court decides that any ruling depends upon an evaluation of the Legislature's rules of procedure and how they were applied, including the related policy determinations made by the Procurement Officer (e.g., the expansion of the Legislative Information Office's footprint), the case would be nonjusticiable.


LAA respectfully notes that this is a very complicated and fact-specific issue to address in the two pages allotted by the Court. To the extent that the Court would benefit from additional briefing, LAA would be happy to provide it.

⁶ See Procurement Officer's Findings Under Legislative Procurement Procedure 040(d) at 4-9 (attached as Exh. F to Affidavit of Kevin M. Cuddy) (filed Feb. 3, 2016).

⁷ Cf. *State Center, LLC*, 92 A.3d at 421; AS 36.30.685.

DATED: March 11, 2016.

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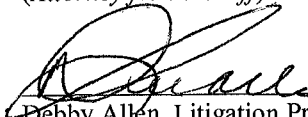
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CERTIFICATE OF SERVICE

This certifies that on March 11, 2016, a true and correct copy of the foregoing was served via First Class Mail on:

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