

JEFFREY M. FELDMAN
DID: (206) 676-7066
EMAIL: jeffF@summitlaw.com

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HAND-DELIVERED

Senator Gary Stevens
Procurement Officer
Legislative Affairs Agency
716 W 4th Avenue, Suite 100
Anchorage, AK 99501-2133

Re: Contract Claim – Legislative Affairs Agency, LIO Lease

Dear Senator Stevens:

Pursuant to AS 36.30.620, 716 West Fourth Avenue, LLC (“716”) files its claim arising from the contract awarded to 716 by the Legislative Affairs Agency (“LAA”) for the Anchorage Legislative Information Offices (“LIO”) 2013 Lease Extension (“Lease”). As Chair of the Legislative Affairs Council, this claim is being presented to you in your capacity as Procurement Officer.

In *Alaska Building Inc. v. 716 West Fourth Avenue, LLC*,¹ the Superior Court found the Lease to be invalid based on the LAA’s non-compliance with the State Procurement Code.² Following the court’s ruling, 716 provided notice to the LAA that it would pursue claims stemming from the procurement through the administrative process set forth in the procurement code.³

¹ Anchorage Superior Court Case No. 3AN-15-05969CI.

² Exs. 1–2 (716 encloses an Exhibit Notebook, referenced throughout).

³ Ex. 3. More recently, 716 confirmed with the LAA’s counsel that the LAA agrees the 90-day deadline for filing such claims under AS 36.30.620 was triggered by Judge Patrick McKay’s final order denying 716’s Motion for Reconsideration in the case, issued May 20, 2016. Ex. 4.

AS 36.30.620 establishes the statutory authorization and administrative process for addressing 716's claims arising out of the LAA's procurement code violations. Indeed, the State's procurement code contains an exclusive remedy provision that dictates, "[n]otwithstanding AS 44.77 or other law to the contrary, AS 36.30.560-36.30.699 and regulations adopted under those sections provide the exclusive procedure for asserting a claim against an agency arising in relation to a procurement under this chapter."⁴

The Superior Court determined in *Alaska Building, Inc. v. 716 West Fourth Avenue LLC* that the 2013 lease extension was invalid due to the LAA's failure to conform its award of the Lease Extension to the requirements of the State's procurement code.⁵ 716's claims against the LAA, outlined below, stem from this failure. The agency has elected not to seek a remand of the lease procurement to cure the defects⁶ and has advised through its counsel of record that: "In the absence of a valid lease [because of the court's rulings], LAA will have no choice but to vacate the property and to secure alternate premises in due course."⁷ Thus, such claims necessarily "arise in relation to procurement" for purposes of AS 36.30.690. The claims described below are brought because the Legislature's decision to abandon its commitments to 716 and seek another building improperly imposes the consequences of its flawed process entirely on 716.

I. BACKGROUND

Pursuant to AS 36.30.020, the Legislative Council is directed to "adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch." The LAA acts as the "vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature."⁸ Additionally, the LAA, through its Division of Administrative Services, manages procurement and facilities for the Legislature.⁹

⁴ AS § 36.30.690; *see also* *Bachner Co., Inc. v. Weed*, 315 P.3d 1184, 1194 (Alaska 2013) (Even "suits against individual procurement officers for acts within the course and scope of their official duties can fairly be characterized as 'claims against an agency.'" Therefore, Bachner's suit was barred by the exclusive remedy provision).

⁵ Specifically the requirements set forth in AS 36.30.083(a).

⁶ *See* Ex. 5 (LAA's Resp. to 716's Motion for Reconsideration, seeking only what other "necessary and proper relief" may be available to the parties in light of the court's ruling).

⁷ Ex. 6.

⁸ <http://akleg.gov/legaffairs.php> (last visited July 5, 2016).

⁹ *Id.*

A. The Original Lease Procurement and Lease Term (2002-2013).

The LAA put the original Anchorage LIO lease out for public and competitive bidding twice, through two separate Request for Proposals (RFPs). The first RFP was issued in April 2002 and sought 20,000 to 25,000 square feet of office space.¹⁰ The second RFP was issued in July 2003 and sought 24,000 square feet of office space.¹¹ That RFP resulted in two responses and, nine months later, in April 2004, the lease contract was awarded to 716.¹² No party protested the award of the contract.

As a result of the 2003-2004 procurement process, the LAA and 716 entered into a five-year lease agreement that also provided five one-year options to extend the lease at the end of the base term. The State subsequently exercised all five year-long options to extend the lease between 2010 and 2015.¹³

The Legislature indicated its interest in upgrading and expanding the LIO space throughout the lease period, generating five separate, publicly advertised Requests for Information (“RFI”).¹⁴ The RFIs generated several proposals by building owners and developers, and presented the State with a wide range of alternatives and options.¹⁵

In addition to the RFP’s and the RFI’s, the State made four efforts to pursue a government-to-government procurement of space for the legislature in Anchorage. The first effort, in 2008, was directed to the Alaska Court System space located at 4th Avenue and H Street.¹⁶ The second effort was made in 2009 and was directed to the Alaska

¹⁰ Exs.7, 14.

¹¹ *Id.*

¹² *Id.*; Ex. 8. The awarded lease was for the same space that the LIO had occupied continuously for the previous 10 years under a lease that had resulted from an RFP and a review by the State of the competitive bids that were submitted. *See, e.g.*, Ex. 9.

¹³ Exs. 9–13.

¹⁴ *See* Exs. 7, 14 (the first RFI was issued in February 2006. That RFI was followed by subsequent RFI’s in March 2007, May 2009, June 2011 and May 2013. The June 2011 RFI received 22 responses, within the designated area, as well as others outside the area--offering locations ranging from downtown Anchorage to Klatt Road.). The Legislature selected the Unocal building, but was later unsuccessful in buying it.

¹⁵ *See id.*

¹⁶ *Id.*

Department of Administration land at 8th Avenue and E Street.¹⁷ The third effort was made in 2011 and was directed to the Anchorage Community Development Authority proposed new building at 7th Avenue and F Street.¹⁸ The fourth effort also occurred in 2011 and was directed to the Alaska Mental Health Trust Authority land at 7th Avenue and L Street.¹⁹ In addition, another RFI was issued in June 2011, seeking 30,000 to 45,000 square feet of office space across a broad swath of Anchorage.²⁰ None of these efforts was successful.

During the same time period, the State made two attempts to purchase the then-shuttered Unocal Building located at 9th Avenue and L Street; first in April 2010 and again in November 2011.²¹ Neither of those efforts was successful.

B. The Lease Extension (2013).

By May of 2013, the State had initiated 13 public, competitively bid, open procurement attempts to obtain additional space for the LOI over a period of more than 8 years, yet still lacked a solution. Only 12 months remained before the Legislature's 10-year lease of its existing space would expire. When it was apparent that no new space was likely to be procured during the time remaining in the lease, the Legislative Council approached 716 to discuss another extension.

At the Legislative Council's request, 716 presented the State with three options for the LIO space at a meeting of the full Legislative Council on May 13, 2013.²² The three options provided by 716 were:

OPTION A: Re-carpet and re-paint the space, and maintain the below-market lease rate.

OPTION B: Option A, plus upgrades to the public restrooms, mechanical systems, and elevators, with a moderate increase in the lease rate.

¹⁷ Id.

¹⁸ Id.

¹⁹ *Id.*

²⁰ Exs. 7, 15.

²¹ Ex. 7.

²² Ex. 16.

OPTION C: A full renovation of the building and the associated parking area, to provide a solution that would resolve LIO's space issues for a projected 40-plus years, with a corresponding higher lease rate.

The Legislative Council evaluated the three options that were presented, but also ordered one more RFI to determine whether any other building could meet its unique requirements.²³ On June 7, 2013, the Legislative Council met to consider the responses to the RFI's. Two responses were submitted, and the Council deemed both to be unacceptable.²⁴ After reviewing the submitted proposals and 716's proposal, the Legislative Council voted unanimously to authorize the Chairman to negotiate an extension of its lease based on 716's proposed Option C, a full renovation of the facility.²⁵ Two less-expensive alternatives proposed by 716 remained available to the Legislature, but the Legislative Council determined that only Option C would meet the State's needs.

As part of its decision, the Legislative Council requested and approved that the design and construction team at the Alaska Housing Finance Corporation ("AHFC") be retained to serve as the tenant's representative, review the plans and process for the renovations, check the design-build contractor's bid proposal, and retain multiple third party experts to research, study, and validate the proposed extension costs and terms.²⁶ AHFC has performed this function previously for the LAA and other major State land and building transactions.²⁷ The Legislative Council authorized the Chairman to execute any agreements as needed with AHFC as well as the lease extension itself without further approval by the full Council.²⁸

Subsequent to that approval, between June and August 2013, 716 and its project team met weekly with LAA staff so that the staff could outline its exact specifications for the desired improvements. 716 also shared the design and pricing information with AHFC—under the oversight of AHFC Executives Mike Buller and De Wayne "Doc" Crouse. Essentially, the process required open books, with AHFC having full access to design and

²³ Exs. 17–18.

²⁴ Ex. 19.

²⁵ *Id.*

²⁶ Exs. 19–20.

²⁷ AHFC also undertook site inspections and approved the pay requests for the tenant improvement work that was funded directly by the State. Exs. 21–24.

²⁸ Ex. 20.

pricing documentation that would form the basis of the lease terms.²⁹ These documents included, but were not limited to the schematic presentation,³⁰ and the narratives addressing code studies, demolition, electrical and mechanical work, site plan and renovation work.³¹ These updated documents would eventually become the lease design and schedule exhibits³² and were delivered along with the construction budget³³ to AHFC prior to execution of the Lease.

Although the Legislative Council gave the Chairman authority to act on its behalf in completing the lease extension, on August 23, 2013, the Chairman reconvened the Council again. In executive session the council heard a “financial update” which, on information and belief, was an update of the scope and costs associated with the proposed extension.³⁴ By this time, the construction improvements had been specified and reviewed and pricing had been set. An independent real estate appraiser had also begun a full appraisal. The Legislative Council went into executive session, following which it noted that there were no objections to moving forward and added only one additional request by motion: “authorize the Chairman to research the possibility of a lease-purchase agreement with the landlord concurrently with the ongoing lease negotiations.”³⁵ The motion was unanimously approved.³⁶

Subsequently, the independent real estate appraiser completed a full review and validation of the proposed lease extension terms.³⁷ The cost of the project was reviewed by independent cost consultants.³⁸ The lease extension was signed by authorized representatives of the landlord and the LAA on September 19, 2013.³⁹ The lease extension dictated the level of renovations to be completed, the schedule within which to complete them, and the fixed lease rate for ten years. It also obligated 716 to complete the specified level of improvements at its own risk and provided that 716 would be held

²⁹ Buller Aff. ¶¶ 3-5.

³⁰ Ex. 25.

³¹ Ex. 26. The attachments to these documents are voluminous and thus are not attached, but can be upon request. They, of course, are in the agency files.

³² Ex. 27.

³³ Ex. 28.

³⁴ Ex. 29.

³⁵ Ex. 29.

³⁶ *Id.* The project pricing was commercially reasonable. Buller Aff. ¶ 7

³⁷ Ex. 30.

³⁸ Ex. 31; Buller Aff. ¶ 6.

³⁹ Ex. 32.

liable to the State for actual damages and possible lease termination if the landlord did not timely perform.⁴⁰

Immediately upon execution of the Lease, 716 completed the purchase of the Anchor Pub building, adjacent to the existing LIO building, which was required for it to fulfill its obligations under “Option C,” the choice selected by the Legislature and embedded in the terms of the Lease. The consideration paid by 716 for purchase of the property was \$3,150,000.⁴¹ The purchase of the Anchor Pub would not have been pursued and closed but for the requirements of the Lease.

Between January and February of 2014, after work on the improvements commenced, AHFC and the Legislative Council’s Chairman met with the 716 to discuss the details of a possible purchase of the building. While under no obligation under the Lease to sell the property to the State, at the Council’s request a carefully negotiated Memorandum of Understanding, providing for the purchase of the building subject to a ground lease, was executed by the 716, AHFC, and the LAA on February 18, 2014.⁴² On March 17, 2014, Representative Hawker updated the Legislative Council on the Memorandum of Understanding and detailed the financial benefits of pursuing a purchase of the building—a step which would have reduced the cost of ownership to about the same level had it simply renewed the old lease with no improvements.⁴³ No action was taken on the Memorandum of Understanding.

Following 16 months of renovations, on December 22, 2014, authorized representatives of the State signed a Subordination and Non-Disturbance Agreement for the benefit of EVERBANK, the project’s long term lender, confirming that 716 had completed the full scope of the tenant’s requested improvements within the agreed upon time and for the agreed upon amount.⁴⁴ The loan closed and 716 contributed \$8,900,000 of its own equity capital and borrowed \$28,600,000 from EVERBANK,⁴⁵ secured by a deed of trust on the real estate collateral and an assignment of the Lease,⁴⁶ and guarantees executed by the members of 716.⁴⁷ In late December, the LAA took occupancy of the building and on

⁴⁰ Id.

⁴¹ Ex. 33.

⁴² Ex. 34.

⁴³ Exs. 35, 36.

⁴⁴ Ex. 37.

⁴⁵ Ex. 38.

⁴⁶ Exs. 39–41.

⁴⁷ Ex. 42.

January 1, 2015, the LAA commenced payment of its new lease amounts, drawing on money contained in the FY 2015 budget, specifically allocated by the Legislature in support and acknowledgement of its lease obligations to 716.⁴⁸ The LAA executed an estoppel certificate on June 30, 2015, to EVERBANK acknowledging that the Lease was in effect, that Landlord had completed its work, and that the LAA was in possession of the Premises, among other items.⁴⁹

C. The Alaska Building Inc. Lawsuit

On March 31, 2015, Alaska Building Inc. (“ABI”), which owns one of the buildings neighboring the Anchorage LIO, filed suit in Anchorage Superior Court against 716, the LAA, and two other entities involved in the lease extension, alleging, inter alia, that the Lease was illegal under the State’s procurement code.⁵⁰

Specifically, ABI alleged that the Lease did not qualify as a lease extension under AS 36.30.083(a), based on the nature of the renovations ordered by the Legislative Council, and the agreed upon rental rate for the building.⁵¹

On March 24, 2016, the court ruled that “the lease does not qualify as an ‘extension’ under AS 36.30.083(a) and is illegal.”⁵² The court vacated all further proceedings in the case based on this finding, noting that because it held the lease to be invalid, it was not necessary to determine whether the lease rate violated the State’s procurement processes.⁵³

On March 30, 2016, 716 moved for reconsideration.⁵⁴ The court denied 716’s motion and issued its final order on May 20, 2016, affirming its prior ruling.⁵⁵ The LAA did not

⁴⁸ See AS 36.30.080(c)(1); Ex. 43.

⁴⁹ Ex. 44.

⁵⁰ Ex. 45.

⁵¹ *Id.*

⁵² Ex. 1, at 2. The court did not consider what effect the Legislature’s ratification of the Lease under AS 36.30.080(a) had on the validity of the Lease and the LAA did not attempt to argue that the Legislature’s ratification provided alternative authority for entering into the Lease. See Ex. 2.

⁵³ Ex. 1, at 17.

⁵⁴ Ex. 46.

⁵⁵ Ex. 2.

further defend its procurement process by appealing the court's ruling.⁵⁶ Subsequent to the ruling, EVERBANK made demand on the LAA to honor the lease.⁵⁷ In response, the LAA indicated it would have "no choice but to vacate the property and to secure alternate premises in due course" based on the court's ruling.⁵⁸

D. The Legislature's Conduct Following the Court's Ruling.

Although 716 continues to believe that a purchase of the LIO by the Legislature offers the most appropriate solution to issues resulting from the LAA's flawed procurement process, the history of the various sales discussions with the Legislature are addressed here only in part. As represented in an analysis dated March 14, 2016, which was ordered by the LAA and completed by Navigant, a purchase price of \$35.6 million would result in a useable square foot lease rate equivalent to the cost of locating to the State Office Building in Anchorage (the Atwood Building).⁵⁹ Following the court's ruling invalidating the Lease, the Legislative Council voted to acquire the building for \$32.5 million. However, no purchase agreement was ever executed by the State, and very shortly thereafter, the Legislative Counsel voted again, this time to buy an entirely separate building to serve as the LIO—the Wells Fargo building.⁶⁰ In short, the Legislature administered a flawed procurement, imposed contract terms that required performance by 716 and established serious penalties for non-performance, took possession of the leased property after 716 invested more than \$37 million of its own and borrowed funds, and then proceeded to take methodical steps to abandon its Lease obligations.

II. 716's CLAIMS

The Legislature's decision to abdicate its duties under the Lease following the court's ruling has caused significant damage to 716. 716 relied on the Lease and the express and implied promises and representation by the LAA, and fully performed under the contract during the last three years at great cost. Under Alaska law, despite the court's order, the Legislature cannot impose the entire cost and burden of its flawed procurement process,

⁵⁶ Ex. 47.

⁵⁷ Ex. 48.

⁵⁸ Ex. 6.

⁵⁹ Exs. 49, 50.

⁶⁰ Minutes from the May 2, 2016, meeting are not yet available. Footage of the meeting is posted at 360 North, available at: <http://www.360north.org/gavel/video/?clientID=2147483647&eventID=2016051004>.

and the effort and expense contractually required of 716, on 716's shoulders. Public policy and the need for the public to have faith in the State's contracting obligations require that the Legislature bear the cost and consequences of its decision to abandon the LIO building. Although the court ruled that the Lease did not comply with AS 36.30.083(a) and is thus invalid, the court went no further in reviewing what relief may be necessary given 716's extensive reliance on the LAA's award of the lease extension nearly three years ago. These proceedings thus pick up where the court left off.

A. Estoppel

Alaska courts have long recognized the doctrine of promissory estoppel as "an affirmative theory for granting equitable promissory estoppel remedies."⁶¹ This includes, as discussed in Section III, *infra*, the recognition and application of the doctrine as one that "can be applied independently from its application as a consideration substitute, allowing reliance damages."⁶²

The Alaska Supreme Court previously has considered and applied the doctrine of estoppel in a context similar to that presented here, namely the cancellation of a government contract based on a determination that the contract violated a statute. In *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation*,⁶³ the Court adopted, with one change, Judge Margaret Greene's trial decision. As Judge Greene stated, the question before her was: "The court must decide what remedy is appropriate for a contractor who is awarded a public contract which turns out to violate a statute or regulation."⁶⁴ After reviewing federal and state law precedent, she concluded that the remedy should be analyzed under the doctrine of estoppel and that four factors should be addressed in that analysis: (1) the assertion of a position by conduct or word, (2) reasonable reliance on that assertion, (3) resulting prejudice, and (4) potential prejudice to the public interest.

When the four factors identified in *Earthmovers* are applied to 716's claims, it becomes apparent that estoppel both applies and is justified with regard to the LAA's actions in this instance.

⁶¹ ERIC MILLS HOLMES, Restatement of Promissory Estoppel, 32 Willamette L. Rev. 263, 306 (1996) (citing *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 960 (Alaska 1983)).

⁶² HOLMES at 306.

⁶³ 765 P.2d 1360 (Alaska 1988).

⁶⁴ *Id.* at 1364.

1. The assertion of a position by conduct or word.

In *Earthmovers*, this requirement was met simply by the department's execution of the award.⁶⁵ Similarly, here it is met by:

- The award of the lease extension and the Legislature's numerous assertions and certifications that the lease extension was valid, was in effect, and was in compliance with applicable law;
- The multiple positive motions by the Legislative Council, detailed above, to proceed as the lease approval progressed;
- The findings of the procurement officer under section .040(d);⁶⁶
- The certification of Pamela A. Varni that the cost savings requirement had been met and that it was in the best interests of the state;⁶⁷ and, eventually
- The approval by the full Legislature by its appropriation to pay the first year's rent as required by AS 36.30.080(c)(1).⁶⁸

The first *Earthmovers* factor is thus thoroughly satisfied and not subject to serious dispute.

2. Reasonable reliance on that assertion.

In *Earthmovers*, the contractor was found to have reasonably relied on the binding nature of its bargain until the Supreme Court issued a stay of the contract award and the State notified the contractor to suspend all operations it was conducting pursuant to the award.⁶⁹ As a general matter, once the State has entered into a properly executed contractual commitment, public policy mandates that its citizens are entitled to rely on the executed contract and proceed with performance. Here, the Lease not only required

⁶⁵ *Id.* at 1370 n. 10.

⁶⁶ Ex. 51.

⁶⁷ Ex. 52.

⁶⁸ Ex. 43.

⁶⁹ *Earthmovers*, 765 P.2d at 1370 n. 10.

performance by 716, it imposed remedies and substantial penalties in the event the project was not timely and properly delivered by the scheduled occupancy date.

Beyond these general principles justifying reliance, there is no question that 716 reasonably relied on the Legislature's assertions regarding the validity and legality of the lease extension when it incurred the costs and performed the work required to customize the LIO building to the Legislature's needs and make it available for occupancy. Even beyond the actions of the Legislative Council, the entire Legislature approved the lease when it appropriated the funds for the first year's rent in compliance with AS 36.30.080(c). Further, not only did 716 reasonably rely on these requirements, but the three banks that approved the credit of the lease did as well.⁷⁰ The Legislature accepted the building as properly delivered and, prior to loan closing, provided written assurances to that effect to 716's primary lender.⁷¹

3. Resulting prejudice.

The prejudice here dwarfs the prejudice suffered in *Earthmovers*.⁷² 716 arranged for the investment of \$37 million dollars in debt and equity to renovate a building uniquely designed to the needs of the Legislature—a special use office building.⁷³

Indeed, the LIO's demands were particularly unique, given the seasonal nature of the Legislators' use. The rental value appraisal ordered by AHFC reflected the building's special use classification, explaining:

One very unusual feature of the LIO occupancy which influences the features and capabilities of the building is the twice-yearly relocation of legislative offices from Anchorage to Juneau and back as each annual session of the legislature commences in January and closes in April or May. This means that personnel, office furnishings, and equipment, files and documents and other contents are assembled and shipped. Consequently, the building has a storage and staging area located adjacent to the freight elevator on the ground floor and basement levels to manage the shipping

⁷⁰ See Ex. 48.

⁷¹ See Ex. 37.

⁷² See *Earthmovers*, 765 P.2d at 1371 (Earthmovers' reliance lasted only five days before its contract was canceled).

⁷³ Ex. 30.

and receiving of the equipment, files and furnishings used in the LIO function.

Other special features of the building include a roof top open area accessed from the second floor of the tower, standby electrical generation equipment (in the event of a loss of power) . . . [and] audio-visual equipment associated with the ability to hold legislative hearings.⁷⁴

These features, as originally contemplated, were designed and provided specifically for the Legislature's needs. Once the LIO terminates its tenancy, and the space is vacated, there will be tangible and substantial impact, the extent of which will not be fully accounted for until a replacement tenant is found and money is spent to undo the special configuration that was required for the Legislature's unique needs, and redesign and build out the space for a new tenant.

In addition, without the Legislature as the tenant under the lease, 716 will fall into default of its loan terms. EVERBANK has notified 716 and the State of this fact.⁷⁵ EVERBANK can make demands under the guarantees that were provided by 716's principals and take title to the property by foreclosure. It is highly unlikely that 716 will be successful in finding a replacement tenant that is able and willing to take occupancy before this happens. There are substantial reasons for this: (i) the current special use of the building for public uses that are not equally marketable to a private user; (ii) the change in the economic market since the Lease was signed, and (iii) the fact that a building of this size requires substantial marketing time. Time, however, is not a luxury that 716 has; it has ongoing debt service obligations that must be met to avoid default.

Time becomes an even greater barrier to 716's ability to mitigate its damages resulting from the Legislature's erratic conduct. The Legislature engaged in negotiations to buy the LIO building, only to later change course and pursue space in another office building in Anchorage, as noted *supra*. Meanwhile, although LAA's counsel has represented to EVERBANK that it has no choice but to vacate the premises, the Legislature has continued to pay rent, and most recently has indicated it will continue to do so through September 2016. Thus, the LAA has disclaimed its intention to perform its obligations to 716 while, at the same time, it has continued to occupy and tie up the property. This

⁷⁴ *Id.* pp. 23-24. The building also includes considerable public space—the lobby, security, public meeting spaces, the auditorium, and a library which are oversized to fit its public function.

⁷⁵ Ex. 53.

degree of inconsistency and indecision, not to mention the LAA's utter failure to communicate with 716 directly regarding its future plans, leaves 716, for all intents and purposes, hamstrung and limited in its options.

The end result will be a substantial long-term loss to 716—including liability for the extent of its recourse guarantees, as well as loss of its equity investment and the improvements. These losses exceed \$37 million. The lost lease revenue stream alone is approximately \$29,290,352.00 (not discounted to present value from October 2016 to the end of the initial lease term), excluding any consideration of lease extensions.

4. Prejudice to the Public Interest.

Although one purpose of the procurement code is to protect the public purse, the public interest in this context is construed far more broadly: the Supreme Court in *Earthmovers* explained that it “has also recognized that treating contractors honestly and fairly serves the public interest.”⁷⁶ The Court then noted that it was necessary to balance the two policies to reach a fair result. It is significant that the Court in *Earthmovers* distinguished the facts in that case from those in *City of Kenai v. Filler*, “where a public entity accepted the benefits of work performed and then tried to avoid paying for them. On those facts, justice required that the contract be enforced.”⁷⁷ The conditions in the LIO lease mirror those in *City of Kenai*. 716 fully performed its end of the bargain, the legislature took occupancy, and justice requires that the contract expectancies be honored.

To elaborate, the lease was signed after the procurement findings, 716 proceeded with design and construction, and take out financing occurred in reliance on a lease fully approved by the Legislature under AS 36.30.080(c)(1). Several banks extended credit based on those actions—debt and equity totaling \$37 million were invested, based in part upon an assignment of rents from this Lease—and the Legislature took possession and has enjoyed the use of the facility for over a year. The negotiated agreement contemplated occupancy for ten years and the economics of the lease agreement do not work for a shorter tenancy – that is, the cost of the renovations and improvements required by the LAA cannot be amortized over a shorter period. It will be a clarion call to the entire financial community—and a serious blow to the public interest—if the State can cancel a lease and walk away after the other party has fully performed, based on a

⁷⁶ *Earthmovers*, 765 P.2d at 1370 (citing *King v. Alaska State Housing Authority*, 633 p.2d 256, 262 (Alaska 1981)).

⁷⁷ *Id.* at 1370-71 (citing *City of Kenai v. Filler*, 566 P.2d 670 (1977)).

court ruling finding the lease invalid because of errors by the State in administering its own procurement process.

Applying all four of the factors adopted by the Alaska Supreme Court, the Legislature is liable for 716's reasonable reliance damages, as outlined below.

III. DAMAGES

Pursuant to AS 36.30.620(a), 716 seeks its full reliance damages resulting from the claims set forth above in the amount of \$37,016,021.

As discussed above, as a result of the State's abrogation of its lease responsibilities, 716 will lose title to the property through foreclosure. It also will incur substantial monetary losses pursuant to the personal guarantees executed by 716's principals. Because, at the end of the foreclosure process, 716 will not own the building, its reliance damages are measured by its investment. Certainly there is time, should the Legislature acknowledge its responsibilities for its past decisions and commitments, for such damages to be mitigated, such as a negotiated sale with the bank and 716. Such a sale was previously explored without success. Still, a solution may remain available to the Legislature; however, it requires a commitment and will to act. Unless and until that happens, 716 is entitled to its full reliance damages.

Reliance damages are the correct measure of harm under the doctrine of estoppel, which seeks to return to a party that has reasonably relied on the actions of another to "the loss sustained by expenditures made in reliance upon [that party's] assurance."⁷⁸ Indeed, fundamentally estoppel is "a theory, independent of contract, for awarding reliance damages."⁷⁹ The question of what form damages take in this case is somewhat academic. Whether 716's damages are recognized as reliance damages or in quantum meruit and

⁷⁸ *Goodman v. Dicker*, 169 F.2d 684, 685 (D.C. Ct. of Appeals 1948); *see also*, *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981).

⁷⁹ *Jarvis v. Ensminger*, 134 P.3d 353, 364 (Alaska 2006); *see also* Restatement (Second) of Contracts § 90 comment d. (1981) ("A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise.")

thus measured as the market value of its services (or the defendant's gain), the amount in controversy remains the same. It is well established that "the value of the plaintiff's services measures the defendant's gain when the defendant requests the work: the defendant's benefit is receiving what he or she requested."⁸⁰

The amount of 716's reliance damages cannot be disputed. As detailed above, the LAA induced 716's reliance and the expenditure of substantial funds to perform under the Lease. Moreover, the Lease dictated the level of renovation selected by the LAA, which was extensive and closely monitored by the AHFC, the Legislature's tenant representative. At the direction of the LAA, to perform its landlord obligations under the Lease, 716 acquired the Anchor Pub property and completed the improvements specified under the Lease. This undertaking required 716 to invest \$37,016,021, consisting of both debt and equity. The amount of 716's expenditures is not and cannot be in dispute as the design and construction of the LIO building was an open book process with AHFC reviewing both the project budget and the costs incurred. Prior to the lease being signed, AHFC had reviewed the project budget.⁸¹ Moreover, AHFC did not merely review the budget. As detailed earlier, AHFC consulted on the design drawings and pricing for this project, including the internal mark-ups on the budget and internal rate of return on the investment.⁸² The project was run with open books between the AHFC, acting on behalf of the tenant, and 716. Thus, the costs incurred by 716 in reliance on the LAA cannot realistically be in controversy.

716 faces losses beyond the investment captured above. The impacts to the credit of the principals are substantial. The collateral consequences of having a project fail and being thrown into what has become a politically charged debate about state spending have far reaching consequences to future projects.⁸³ However, given the equitable nature of this

⁸⁰ Candace S. Kovacic, A PROPOSAL TO SIMPLIFY QUANTUM MERUIT LITIGATION, 35 Am. U. L. Rev. 547, 645 (1986) (citing G. Palmer, THE LAW OF RESTITUTION (1978) § 4.2, at 372, § 5.3, at 576-77; S. Williston, WILLISTON ON CONTRACTS (1957) 2).

⁸¹ Ex. 28.

⁸² Ex. 54. The Legislature included \$7.5 million of its own TIs into the project, so the total project cost of \$44,516,021 was net to 716 a total of \$37,018,021 which included \$8,418,021 in owner equity contributions—land and cash above the EVERBANK loan.

⁸³ Buller Aff. ¶ 8.

remedy, it is understood that the restitution principle may not fully cover all losses.⁸⁴ Lease default may impose additional out of pocket expenses that 716 will incur and 716 reserves the right to amend or supplement the record on its losses. At a minimum, the State should bear the cost of its failed procurement process, its failure to attempt to correct any procurement deficiencies or appeal the court's ruling on the lease, and its ultimate decision to abandon the lease and its prior commitments to 716.

IV. CONCLUSION

Following no less than 13 failed attempts at securing a space suitable for the LIO, the State approached 716 to provide a solution. 716 provided the LAA three options for the LIO. The LAA chose the option presented that it believed would best meet its needs.

Through every step of the procurement process 716 did exactly what was asked of it by the LAA, within the schedule set by the LAA, and at the contractually agreed upon lease rate. To fulfill its contractual obligations to the State pursuant to the Lease, 716 arranged for the investment of approximately \$37 million.

In response, the LAA now has abdicated its corresponding tenant duties, relying on the court's ruling that the Lease is invalid. The court's ruling was in turn based on the LAA's failure to conform its procurement processes to the state procurement code.

The same situation was considered in *Earthmovers*, and *Earthmovers* establishes the legal principles and standards that govern 716's claim. Here, the State induced 716's reasonable reliance through its conduct, resulting in substantial prejudice to 716. Indeed, 716 now finds itself in default to its primary lender and, absent an intervening event, will lose the building to foreclosure. It has little capacity to mitigate the damages it faces, as the LAA's early and thorough involvement in the LIO renovation ensured that the building was especially suited to its unique needs and demands. Finding a replacement tenant at a lease rate that would mitigate 716's damages is unlikely if not impossible before the prospect of full default and loss of the asset occurs.

Beyond 716's damages, the LAA's actions are perhaps most significant in their deleterious effect on the public interest, the fourth estoppel factor articulated in

⁸⁴ However, some courts have read Section 90 of Restatement to allow for more flexibility in the consideration of what remedy "justice requires." See *Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, 750 P.2d 231, 240 (Wash. 1988) (en banc) (Pearson, C.J., concurring).

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Earthmovers. The LAA's conduct in this instance should serve as public notice of the State's willingness to abandon its contractual obligations in the name of expediency, regardless of the consequences to those entities providing services to the State.

716 submits the claims set forth herein and seeks its full reliance damages relating to the 2013 Lease procurement, in the amount of \$37,016,021.

Sincerely,

SUMMIT LAW GROUP PLLC



Jeffrey M. Feldman

Enc: Exhibit Notebook

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CONTRACTOR CERTIFICATION

Pursuant to AS 36.30.620(a) 716 West Fourth Avenue, LLC certifies that its claims are brought in good faith, and that the supporting data provided are accurate and complete to the best of its knowledge and belief. The amount requested accurately reflects those damages the State is liable to 716 West Fourth Avenue, LLC for as a result of the Legislature's actions as stated above. These claims have been filed within the 90-day deadline set forth in AS 36.30.620(a).

716 West Fourth Avenue, LLC



By: Mark E. Pfeffer
Its: Manager