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February 28, 2014

BY HAND DELIVERY

U.S. Court of Federal Claims
Clerk
717 Madison Place, NW
Room 103
Washington, DC 20439

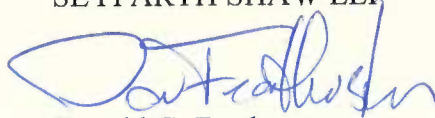
Re: Anchorage, A Municipal Corporation v. The United States of America

Dear Sir/Madam:

Enclosed for filing please find an original and two copies of the Complaint along with our check in the amount of \$400.00 for the filing fee. Please return the date stamp copy to our waiting messenger.

Sincerely yours,

SEYFARTH SHAW LLP



Donald G. Featherstun

DGF:rat
Enclosures



131 SOUTH DEARBORN CHICAGO, ILLINOIS 60603

CHECK NO.

138638

REF. #	INV. #	DATE	INVOICE AMOUNT	INVOICE DESCRIPTION	AMOUNT PAID
1652393	022714	02-27-14	400.00	R. Turner 77218-000002	400.00

CHECK DATE

02/27/14

Bank of America
Chicago, IL 60661

SEYFARTH
ATTORNEYS SHAW LLP

131 South Dearborn Street Suite 2400 Chicago, IL 60603-5577

CHECK NO.

138638

2-50/710

GENERAL ACCOUNT
CHECK AMOUNT

\$****400.00

FOUR HUNDRED AND 00/100 Dollars

PAY
TO THE
ORDER OF

CLERK, U.S. COURT OF FEDERAL CLAIMS

Seyfarth Shaw LLP

1502

UNDER \$5000 ONE SIGNATURE
VOID AFTER 90 DAYS

11 138638 11 10710005051 5201743456 11

FORM 2
COVER SHEET

In The United States Court of Federal Claims

Cover Sheet

Plaintiff(s) or Petitioner(s)
Anchorage, a Municipal Corporation

If this is a multi-plaintiff case, pursuant to RCFC 20(a), please attach an alphabetized, numbered list of all plaintiffs.

Name of the attorney of record (See RCFC 83.1(c)): Donald G. Featherstun

Firm Name: Seyfarth Shaw LLP

Post Office Box: _____

Street Address: 560 Mission Street, Suite 3100

City-State-Zip: San Francisco, CA 94105

Telephone & Facsimile Numbers: (415) 397-2823; (415) 397-8549 (facsimile)

E-mail Address: dfeatherstun@seyfarth.com

Is the attorney of record admitted to the Court of Federal Claims Bar? ☒ Yes ☐ No

Does the attorney of record have a Court of Federal Claims ECF account? ☒ Yes ☐ No

If not admitted to the court or enrolled in the court's ECF system, please call (202) 357-6402 for admission papers and/or enrollment instructions.

Nature of Suit Code: ☐ 1 ☐ 3 ☐ 4

Select only one (three digit) nature-of-suit code from the attached sheet.

If number 213 is used, please identify partnership or partnership group. If numbers 118, 134, 226, 312, 356, or 528 are used, please explain.

Breach of contract of Memorandums of Agreement between Plaintiff and MARAD

Agency Identification Code:

☐ T ☐ R ☐ N

See attached sheet for three-digit codes.

Amount Claimed: \$ 10,000 (at least)

Use estimate if specific amount is not pleaded.

Disclosure Statement:

Is a RCFC 7.1 Disclosure Statement required? ☐ Yes ☒ No

If yes, please note that two copies are necessary.

Bid Protest:

Indicate approximate dollar amount of procurement at issue: \$ _____

Is plaintiff a small business? ☐ Yes ☐ No

Vaccine Case:

Date of Vaccination: _____

Related Cases:

Is this case directly related to any pending or previous case? ☐ Yes ☒ No

If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2.

Nature-of-Suit Codes for General Jurisdiction Cases

100 Contract - Construction - (CDA)	210 Tax - Income, Corporate	352 Military Pay - Retirement
102 Contract - Fail to Award - (CDA)	212 Tax - Income, Individual	354 Military Pay - SBP
104 Contract - Lease - (CDA)	213 Tax - Income, Individual (Partnership)	356 Military Pay - Other
106 Contract - Maintenance - (CDA)	214 Tax - Informer's Fees	
108 Contract - Renovation - (CDA)	216 Tax - Preparer's Penalty	500 Carrier - transportation
110 Contract - Repair - (CDA)	218 Tax - Railroad	502 Copyright
112 Contract - Sale - (CDA)	Retirement/Unemployment Tax Act	504 Native American
114 Contract - Service - (CDA)	220 Tax - TEFRA Partnership - 28:1508	506 Oil Spill Clean Up
116 Contract - Supply - (CDA)	222 Tax - Windfall Profit	508 Patent
118 Contract - Other - (CDA)	Overpayment - Interest	510 Taking - Personalty
	224 Tax - 100% Penalty - 26:6672 -	511 Taking - FIRREA
	Withholding	512 Taking - Realty
120 Contract - Bailment	226 Tax - Other	513 Taking - Rails to Trails
122 Contract - Bid Preparation Costs		514 Taking - Other
124 Contract - Medicare Act	300 Civilian Pay - Back Pay	515 Unjust Conviction and Imprisonment
126 Contract - Realty Sale	302 Civilian Pay - COLA	516 Miscellaneous - Damages
128 Contract - Subsidy	303 Civilian Pay - Disability Annuity	518 Miscellaneous - Lease
130 Contract - Surety	304 Civilian Pay - FLSA	520 Miscellaneous - Mineral Leasing Act
132 Contract - Timber Sale	306 Civilian Pay - Overtime Compensation	522 Miscellaneous - Oyster Growers
134 Contract - Other	308 Civilian Pay - Relocation Expenses	Damages
	310 Civilian Pay - Suggestion Award	524 Miscellaneous - Safety Off. Ben. Act
136 Contract - Other - Wunderlich	312 Civilian Pay - Other	526 Miscellaneous - Royalty/Penalty Gas
		Production
138 Contract - Injunctions (Pre Award)	340 Military Pay - Back Pay	528 Miscellaneous - Other
140 Contract - Injunction (Post Award)	342 Military Pay - CHAMPUS	529 TRIS
	344 Military Pay - Correct records	532 CLA Review - Japanese Internment
200 Tax - Allowance of Interest	346 Military Pay - Correct/Reinstate	534 Indian Claims Commission
202 Tax - Declaratory Judgment - 28:1507	348 Military Pay - Reinstatement	535 Informer's Reward
204 Tax - Estate	350 Military Pay - Relocation Expenses	536 Spent Nuclear Fuel
206 Tax - Excise		
208 Tax - Gift		

Nature-of-Suit Codes for Vaccine Cases

449 Injury - Hepatitis A	485 Injury - Hemophilus Influenzae	477 Death - Pertussis
453 Injury - Pneumococcal Conjugate	486 Injury - Varicella	478 Death - Polio - inactive
456 Injury - DPT & Polio	490 Injury - Rotavirus	479 Death - Polio - other
457 Injury - D/T	492 Injury - Thimerosal	480 Death - Rubella
458 Injury - DTP/DPT	494 Injury - Trivalent Influenzae	481 Death - Tetanus & Diphtheria
459 Injury - Measles	496 Injury - Meningococcal	482 Death - Tetanus & Tox.
460 Injury - M/M/R	498 Injury - Human Papillomavirus	483 Death - Other
461 Injury - Measles/Rubella		487 Death - Hepatitis B
462 Injury - Mumps	452 Death - Hepatitis A	488 Death - Hemophilus Influenzae
463 Injury - Pertussis	454 Death - Pneumococcal Conjugate	489 Death - Varicella
464 Injury - Polio - inactive	470 Death - DPT & Polio	491 Death - Rotavirus
465 Injury - Polio - other	471 Death - D/T	493 Death - Thimerosal
466 Injury - Rubella	472 Death - DTP/DPT	495 Death - Trivalent Influenzae
467 Injury - Tetanus & Diphtheria	473 Death - Measles	497 Death - Meningococcal
468 Injury - Tetanus & Tox.	474 Death - M/M/R	499 Death - Human Papillomavirus
469 Injury - Other	475 Death - Measles/Rubella	
484 Injury - Hepatitis B	476 Death - Mumps	

AGENCY CODES

AGR	Agriculture	SBA	Small Business Administration
AF	Air Force	TRN	Department of Transportation
ARM	Army	TRE	Department of Treasury
AEC	Atomic Energy Commission	VA	Department of Veterans Affairs
COM	Department of Commerce	VAR	Various Agencies
DOD	Department of Defense	O	Other
DOE	Department of Energy		
ED	Department of Education		
EPA	Environmental Protection Agency		
GPO	Government Printing Office		
GSA	General Services Administration		
HHS	Health and Human Services		
HLS	Homeland Security		
HUD	Housing and Urban Development		
DOI	Department of the Interior		
ICC	Interstate Commerce Commission		
DOJ	Department of Justice		
LAB	Department of Labor		
MC	Marine Corps		
NAS	National Aeronautical Space Agency		
NAV	Navy		
NRC	Nuclear Regulatory Commission		
PS	Postal Service		
STA	State Department		

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANCHORAGE, A MUNICIPAL
CORPORATION,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. _____

COMPLAINT

Plaintiff, Anchorage, a Municipal Corporation (hereinafter, "Plaintiff" or "MOA"), by and through its undersigned attorneys, asserts the following claims against the United States Government through its Department of Transportation, Maritime Administration (hereinafter, "Defendant" or "MarAd"):

PARTIES

1. This is an action by the Plaintiff against Defendant for monetary relief as a result of Defendant's breach of its contractual obligations to Plaintiff.

2. Plaintiff MOA is a municipal corporation duly organized and existing under the laws of the State of Alaska.

3. Defendant is the United States, acting by and through its agency, the United States Department of Transportation, which is acting by and through MarAd.

JURISDICTION

4. This Court has jurisdiction over this matter pursuant to the Tucker Act, 28 U.S.C. § 1491, under express contracts as alleged and described herein.

CASE SUMMARY

5. This case concerns MarAd's breach and complete abdication of its contractual responsibilities to MOA. Specifically, MOA and MarAd executed two agreements, wherein MarAd contractually agreed to provide its expertise to design, construct, oversee and manage the Port of Anchorage Intermodal Expansion Project (the "Project"). MarAd's responsibilities also included spending approximately \$302,000,000.00 that MOA provided to MarAd for the Project. MarAd also oversaw the expenditure of approximately \$139,000,000.00 of federal funds that the United States Congress appropriated for the Project.

6. The Project was viewed as a major transportation infrastructure for the Federal Government. Furthermore, the Port of Anchorage ("POA" or the "Port") had been designated a strategic port by the United States Department of Defense and the contracts between MOA and MarAd acknowledged the importance of maintaining a secure and functional port for the Federal Government and the MOA/POA.

7. MarAd contracted with Integrated Concepts and Research Corporation ("ICRC") to design, build, and manage the Project, which in turn, executed contracts with design and construction firms. During that process, MarAd abdicated its contractual responsibility to MOA by failing to provide its purported expertise to design, build and manage the Project. Left on their own, ICRC and the design and construction professionals ICRC contracted with committed

various breaches and independent tortious acts resulting in significant and irreparable design and construction defects that have brought the Project to a complete standstill.

8. MarAd also failed to enforce its contractual rights to require ICRC to rectify the damage at ICRC's own cost, and instead continued to disburse funding to ICRC as if no defects existed. MarAd even went so far as to settle a claim brought by ICRC with MOA's funds, but without MOA's knowledge or consent.

9. MarAd's numerous breaches of its contractual obligations to MOA and its breach of the covenant of good faith and fair dealing, include, but are not limited to: its failure to provide its expertise to design, build and manage the Project; its failure to enforce its rights against ICRC; its disbursement of funds for defective work; and its payment of ICRC's claim using MOA funds without MOA's knowledge or consent. As a result, MOA has been significantly damaged, as the vast majority of the Project's marine construction has been deemed unsuitable for its intended use. MOA's damages include, but are not limited to, the funds it advanced for marine construction to MarAd for which MOA received virtually nothing in return, the loss of the benefit of the federal funds appropriated for the Project, costs incurred to stabilize the defective work, costs MOA will have to incur to re-design and construct a new Port, the loss of use of Port property in lost revenue and other consequential damages, and costs associated with the delay in completion of the Project.

STATEMENT OF CASE

MOA Contracts With MarAd To Design, Construct, And Oversee The Port of Anchorage Intermodal Expansion Project

10. The Project was envisioned to be a multi-year project that would replace deteriorating and outdated facilities, expand the Port's capacity, and increase the Port's ability to

serve MOA, the State of Alaska, commercial tenants, and the United States military. The Project was expected to take place over several years, and involve both design and construction work to expand the Port's facilities through reclamation of municipally owned tidal and sub tidal areas to create new property for additional waterfront facilities.

11. One aspect of the Project, according to MarAd, was to add a new direct road access between the Port and Elmendorf Air Force Base. This access was to facilitate quick deployments of military forces through the port without the need to use the public highway system. The direct road access to Elmendorf AFB had an added benefit of allowing for the mining of fill material on Elmendorf property which was used in creating the new Port facility. The mining of this fill material helped to reduce a flight path hazard at the end of the North-South Runway on Elmendorf. The Project also added new staging areas for military deployments and dual-use facilities which can be used for military hangars for helicopters.

12. MOA, as the owner of the Project, did not have the skills or expertise to design, construct, and oversee the Project, and as such, looked for a party with the requisite skills and expertise to do so.

13. One option available to MOA was to turn to the private sector to secure the expertise necessary to design, construct, and oversee the Project. However, at the time MOA was contemplating the Port expansion, MarAd offered to provide its technical expertise to MOA in connection with the Project as part of an agency-wide initiative to embark on a port infrastructure development program.

14. MOA had secured funds for the Project, and MarAd offered to pursue, with MOA, additional funds from the United States Government to share in the cost of the Port expansion. The plan was for MarAd to use both sets of funds to create a new port for MOA.

15. MarAd and MOA were successful in having the United States Government enact legislation authorizing federal funds for the Project and further providing for the transfer of federal funds and non-federal share funds to MarAd, subject to a proviso in the Consolidated Appropriations Resolution 2003, Pub. L. No. 108-7 §§ 345, 626, 117 Stat. 11, 106, 418 (Feb. 20, 2003), and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59 § 10205, 119 Stat. 1144, 1934 (Aug. 10, 2005), that MarAd administer all federal funds together with MOA matching funds devoted to the Project. The funds transferred to MarAd by MOA to date total approximately \$302,000,000.00. The federal funds provided for the Project total approximately \$139,000,000.00.

16. In 2009, Congress passed the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84 § 3512, 123 Stat. 2190, 2722 (Oct. 28, 2009), codified at 46 U.S.C. § 50302, which mandated that MarAd create the Port Infrastructure Development Program which was to support improvements of port facilities. This statute created the "Port Infrastructure Development Fund" for use by MarAd in carrying out port infrastructure projects. This fund, in part, was designed to "receive funds provided for the project from Federal, non-Federal and private entities that have a specific agreement or contract with the [MarAd] Administrator to further the purposes" of the statute. The statute also specifically authorizes appropriations "as may be necessary to carry out of the program. . . ."

17. Relying on MarAd's purported expertise in designing, constructing, and overseeing port development projects and its authority to administer federal and non-federal share funds, in 2003, MOA executed with MarAd a contract identified as a Memorandum of Understanding (the "2003 MOA-MarAd Agreement"), which delineated the contractual responsibilities of MarAd and MOA with regard to administering and funding the Project.

18. Section III of the 2003 MOA-MarAd Agreement made clear that the objective of the agreement was to assign responsibilities that leveraged the expertise of each party, and for the parties to work cooperatively and ensure coordination of efforts for successful transfer to, and administration of, Project funds by MarAd.

19. As the owner of the Project, MOA, pursuant to Section IV of the 2003 MOA-MarAd Agreement, was to provide MarAd with its program requirements so that MOA's needs and objectives would be taken into account in connection with the design and construction of the Project. To this end, MOA would review Project documentation for the purpose of ascertaining that its program requirements and objectives were in fact incorporated into the Project's plans and specifications.

20. Section V of the 2003 MOA-MarAd Agreement required MarAd to provide specialized technical expertise and input in connection with Port expansion activities, and to expend funding for Project oversight, engineering, design, construction, and program management. MarAd was obligated to disburse funding consistent with federal procurement statutes and regulations.

21. Section V of the 2003 MOA-MarAd Agreement required MOA to pay MarAd, in consideration for MarAd's performance of its services, three percent (3%) of funds MarAd received for the Project.

22. The 2003 MOA-MarAd Agreement at Section VI also provided that neither MarAd nor MOA would shift liability or responsibility for any claims, demands, or causes of action arising from or related to the performance of the 2003 MOA-MarAd Agreement.

23. In 2011, MOA and MarAd executed a second contract identified as a Memorandum of Agreement (the "2011 MOA-MarAd Agreement"), which further set forth the contractual roles and responsibilities of MarAd and MOA in connection with the Project.

24. Like the 2003 MOA-MarAd Agreement, Section V.A of the 2011 MOA-MarAd Agreement, recognized that MOA was the Project owner.

25. Like the 2003 MOA-MarAd Agreement, Section V.B of the 2011 MOA-MarAd Agreement required MarAd to provide subject matter expertise in support of the Project, including but not limited to, Project oversight and management, day to day direction and management of Project activities, contract administration, construction, design and quality assurance services for the Project, as well as to disburse Project funds under the design and construction contracts MarAd held.

26. Like the 2003 MOA-MarAd Agreement, MarAd, under Section V.A of the 2011 MOA-MarAd Agreement, was paid three percent (3%) of all funds received for the Project in consideration for the performance of MarAd's contractual obligations.

27. The 2011 MOA-MarAd Agreement at Section VI made clear that each party would remain liable for the acts or omissions of its employees, and that in the event liability was imposed by an arbiter of competent jurisdiction on either party in relation to a claim by a third party involving the Project, that each party would bear its own damages as allocated or apportioned.

28. Under Section V, Responsibilities, Paragraph B.7 of the 2011 MOA-MarAd Agreement, MarAd promised to:

Pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7001-7013, administer claims submitted by MarAd contractors and coordinate and cooperate with the MOA/POA in affirmative and defense of claims consistent with federal contract law.

29. Furthermore, under Section V, Shared Responsibilities of Both Parties, Paragraph 9 of the 2011 MOA-MarAd Agreement, MarAd promised to:

Manage the Project in good faith for the benefit of the citizens of the Municipality of Anchorage, the People of Alaska and the United States.

30. The 2011 MOA-MarAd Agreement also set forth a disputes resolution process at Section XI, whereby the Parties would engage in a stepped disputes process. Specifically, this provision stated:

XI. RESOLUTION OF DISPUTES:

Notwithstanding [sic] the provisions of part VI(F), the parties agree as follows:

A. Should a dispute arise under this agreement, the points of contact in § X shall initially attempt to settle such matters amicably and expeditiously.

B. Should the points of contact in § X be unable to settle any dispute, both parties shall prepare a briefing to the Project

Executives who will render a decision as the determining administrative officials within a reasonable time.

C. If the Project Executives are unable to settle a dispute in a reasonable time, a termination by mutual agreement consistent with § VIII should commence. This termination by mutual agreement does not extinguish either party's possible remedies.

**MarAd Executes A 2003 Contract With ICRC
As Part of MarAd's
Contractual Obligation To Design, Construct, And Oversee The Project**

31. The 2003 and 2011 MOA-MarAd Agreements established that MOA's role as the Project owner was focused on the programmatic needs of the Port (e.g., maintenance and operation considerations, client needs, etc.), and how these needs would be considered and implemented in the Project's overall design. MOA was not responsible for the Project's technical aspects, the ultimate design and construction of the Project, or the administration of the design and construction. These aspects of the Project were undertaken by MarAd because of its purported technical expertise. MarAd, in turn, contracted with ICRC to bring this Project to fruition. ICRC, in turn, contracted with other design/engineering firms and contractors to complete various aspects of the work.

32. MarAd first contracted with Koniag Services Inc. ("KSI"), the predecessor-in-interest to ICRC. That contract with KSI was designated as Contract Number DTMA12D03009, and later assigned to ICRC through a separate novation agreement between MarAd and KSI (the "2003 MarAd-ICRC Contract").

33. Under the 2003 MarAd-ICRC Contract ICRC was issued Task Orders to, among other things, provide program management, design-build and related procurement services with respect to the Project's management, design and construction.

34. The 2003 MarAd-ICRC Contract contained a Statement of Work ("SOW") that clearly identified MOA and its interests as the owner of the Project, and described ICRC's Project responsibilities. The 2003 MarAd-ICRC Contract contemplated MarAd's issuance of certain Task Orders, which would further delineate ICRC's obligations on the Project. For example, MarAd issued Task Order 111, which provided additional detail with respect to the design-build, administrative, engineering, and construction services ICRC was to provide. Task Order 111 provided, in pertinent part, that:

ICRC will provide qualified design engineering and technical services to assist MarAd with planning efforts, sub-project scoping and definition, overall design recommendations and design development, technical review of specifications, evaluation of cost estimates based upon current market conditions, subcontract management of architectural/engineering (A/E) firms, graphic support, Geotechnical Advisory Committee support, and solicitation preparation for the Year 4 program.

* * *

ICRC will provide qualified construction management services to MarAd for the expansion of the POA [Port of Anchorage] and construction related activities on EAFB [Elmendorf Air Force Base] and the POA.

Construction services will include constructability review of various design documents; technically facilitate the bidding process with industry; develop, manage, and close construction Task Orders (400 series); provide evaluations to MarAd of construction cost estimates prepared by design firms and actual bid results; prepare independent cost and schedule estimates for construction works; provide technical support to contracting staff and aid in negotiations; manage construction contractors to promote delivery of construction works in accordance with design drawings, technical specifications, budget, schedule, and other contract documents...

* * *

35. The 2003 MarAd-ICRC Contract included contract clauses which provided MarAd the right to require ICRC to correct defective work without charge. Specifically, Federal Acquisition Regulation (“FAR”) 52.246-4 (Inspection of Services-Fixed Price) was included, which provided in pertinent part at subsections (e) and (f):

If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount.

* * *

If the Contractor fails to promptly perform the Services again or to take necessary action to ensure future performance in conformity with contract requirements the Government may (1) perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such services.

36. The 2003 MarAd-ICRC Contract also made ICRC liable for all damages to persons or property occurring as a result of ICRC’s fault or negligence. More specifically, the 2003 MarAd-ICRC Contract incorporated FAR 52.236-7 (Permits and Responsibilities Nov. 1991), which stated as follows:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State and municipal laws, codes and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor’s fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract. (emphasis added).

MarAd’s 2008 Contract With ICRC

37. On or about July 16, 2008, MarAd awarded Contract No. DTMA1D08012 to ICRC (the “2008 MarAd-ICRC Contract”) to continue performance of design-build and Project

management related services for the Project. The 2008 MarAd-ICRC Contract contained language and requirements similar to the 2003 MarAd-ICRC Contract, and also contemplated the issuance of Task Orders to further detail ICRC's expected tasks on the Project.

38. The 2008 MarAd-ICRC Contract included FAR 52.246-12 (Inspection of Construction), which stated at subsections (f) and (g):

The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in the contract price. . . .

* * *

(g) If the Contractor does not promptly replace or correct rejected work, the Government may --

- (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor; or
- (2) terminate for default the Contractor's right to proceed.

39. Like the 2003 MarAd-ICRC Contract, the 2008 MarAd-ICRC Contract incorporated the Permits and Responsibilities (Nov. 1991) clause at FAR 52.236-7, which made ICRC responsible for all damages to persons or property that occur as a result of ICRC's fault or negligence.

40. The 2008 MarAd-ICRC Contract formalized what MarAd and ICRC already knew, which was that MOA as the Project owner was a third-party beneficiary under the 2003 and 2008 MarAd-ICRC Contracts, and as such, MOA had a right to MarAd's and ICRC's faithful performance of the 2003 and 2008 MarAd-ICRC Contracts. The 2008 MarAd-ICRC Contract provided in pertinent part:

E.3 ACCEPTANCE OF CONSTRUCTION. Upon acceptance of MarAd of work tendered under this Contract, all right, title and interest to such work shall convey to the **Municipality of Anchorage and its Department Port of Anchorage as a third party beneficiary**, unless otherwise provided. All warranties and guarantees provided by the Contractor shall benefit both MarAd and the Municipality of Anchorage and its Department Port of Anchorage. (Emphasis added.)

ICRC, In Turn, Contracts For The Design and Construction Of The Project

41. Pursuant to Task Order 312, MarAd tasked ICRC with developing a solicitation and contracting for the Project's design.

42. To this end, ICRC in 2006 contracted with PND Engineers, Inc. ("PND") for professional services to prepare a bid-ready project design assembly for the North Waterfront project, preliminary engineering services, and separate bid-ready project design assemblies for follow-on construction projects (the "2006 ICRC-PND Subcontract").

43. The 2006 ICRC-PND Subcontract also provided that PND's design was required to "comply with the applicable Municipality of Anchorage seismic requirements."

44. The 2006 ICRC-PND Subcontract also stated that PND's proprietary Open-Cell-Sheet-Pile (the "OCSP") design had been selected from all the alternatives carried forward for analysis and development by PND.

45. Pursuant to Task Order 414, MarAd also tasked ICRC with contracting for the construction of the Project.

46. On March 19, 2008, ICRC entered into Contract #4414-1-C170 2008 Marine Terminal Redevelopment with QAP pursuant to which QAP was to perform certain earthwork and sheet pile bulkhead work at the Project (the "ICRC-QAP Subcontract"). The ICRC-QAP

Subcontract is a Fixed Price, Not-To-Exceed subcontract comprised of lump sum and unit price bid items with estimated unit quantities which totaled close to \$100,000,000.00.

47. ICRC entered into its contract with QAP notwithstanding a bid protest that challenged QAP's price as being too low and QAP's lack of experience with open cell pile bulkheads.

48. On March 31, 2008, QAP entered into a contract with MKB, a joint venture comprised of three Washington State corporations: D.M. Moor Constructors, Inc., Derian, Inc., and R. Scott Constructors, Inc. (the "QAP-MKB Subcontract"). The QAP/MKB Subcontract, Contract #4414-1-S100, was for the lump sum amount of approximately \$17,000,000.00.

49. MKB was to provide the sheet pile installation required by PND's OCSF design, which was the most difficult and critical part of the Project work.

**Prior To Construction, The Open Cell Sheet
Pile Design Is Deemed Suitable For Its Intended Use**

50. PND's OCSF design involves the installation of a steel sheet pile bulkhead and tail walls. The sheet piles are vertically arranged steel structures that act as a horizontally-tied membrane to retain soil. The bulkhead features a vertical flat sheet pile anchor wall (tail wall) to restrain a curved flat sheet pile arch face. Fill is then placed in the open cells creating additional Port property.

51. ICRC and its design team concluded that the OCSF design was appropriate for Port expansion, and if constructed properly, the OCSF design was internally stable and had adequate factors of safety for global stability under both static and seismic loading.

52. The sheet piles specified in the OCSP design for the cells located in the North Extension portion of the Project varied in length from 70 feet to 90 feet. The specified sheet piles used to construct the tail walls of the cells for the North Extension portion of the Project varied in length from 35 feet to 90 feet.

53. The 90 foot sheet pile lengths are nearly twice as long as those used for previous open cell sheet pile projects. Further, PND's own literature explains that sheet lengths exceeding 24 meters (78 feet) exceed the "practical limit" of OCSP construction.

54. PND's literature also warns that, even with sheet lengths much shorter than those specified for use on this Project, "[i]f very deep driving is required difficulty can almost always be expected."

55. Nevertheless, despite the unprecedented use of sheet piles of the length contemplated for the Project, MarAd never questioned the determination that the OCSP design was suitable for the Project.

Construction Of The OCSP Design Commences, And From The Beginning The Project Is Fraught With Design And Construction Problems

56. The OCSP-related parts of the Project, as designed, were to take place in phases including, as is pertinent here, the construction of the Dry and Wet Barge Berths (collectively, the "Barge Berths"), and the North Extension.

57. The construction of the Barge Berths phase of the Project included the work necessary to create a bulkhead consisting of 39 open sheet pile cells that would be driven into the native soils in accordance with the Project's design and then backfilled to create new property for the Port. The first cell would be installed furthest from the existing Port facilities with the

39th cell constituting a closure cell between the Barge Berths portion of the Project and the North Extension phase of the Project.

58. Cells 1 through 26 of the Barge Berths phase are called the “Dry Barge Berth” because the existing fill elevation for these cells is located at the approximate elevation of +10 Mean Lower Low Water (“MLLW”) and, therefore, constitute dry land during low tide.

59. Cells 27 through 39 of the Barge Berths phase comprise the “Wet Barge Berth,” so named because the cells are located at or within the MLLW elevation.

60. The North Extension phase of the Project consists of the construction of a bulkhead comprised of 65 open cells. Cell number one of the North Extension phase is directly adjacent to cell number 39 of the Barge Berths phase (i.e., the closure cell), and cell number 65 is the nearest cell to the existing dock at the Port.

61. Despite its contractual obligations to MOA, MarAd had nobody present at the Project site with the requisite experience or authority to oversee the construction process. MarAd did not have a Contracting Officer or Contracting Officer’s Technical Representative (“COTR”) at the Project site during the critical stages of the Project. MarAd never developed Project management or inspection protocols, and, on information and belief, prepared virtually no records of its own to document the construction quality or progress. Instead, MarAd completely relied on ICRC, which, in turn, because of its own independent breaches and negligence was unable to fulfill its Project obligations.

62. After construction of the OCSP design commenced, QAP and MKB experienced problems with driving sheet piles. This resulted in the piles being subjected to excessive blow

counts, which caused substantial damage to the sheet piles. MarAd, because it had abdicated its responsibilities, took no action in response to the construction difficulties and the damage caused to the sheet piles.

63. QAP and MKB further encountered during pile driving operations large armor rock that had been placed by another contractor working on another part of the Project adjacent to the open cells. MarAd, because it had abdicated its responsibilities, took no action in response to the difficulties surrounding the large armor rock.

64. The hard driving conditions MKB experienced should have triggered a detailed examination of the work site in the fall of 2008, including dredging followed by diving inspections of the work. MarAd, because it abdicated its responsibilities, took no action in response to the difficulties surrounding the hard driving conditions until the fall of 2010, which by then was too late to salvage the Project.

65. The problems installing the OCSP design continued throughout the 2009 construction season. QAP and MKB contended that the hard clays were impacting their ability to drive the sheet piles. Rather than properly address the situation by, for example, devising additional pile driving methods, or revising the Project's design to accommodate the actual site conditions, the parties to the Project began pointing fingers at one another and continued upon the same course that had created problems during the 2008 construction season. Again, MarAd, because it had abdicated its responsibilities, took no action in response to the difficulties driving the sheet piles.

2010 Inspections Show Large-Scale Damage And Defective Work

66. When investigations and inspections did commence in 2010, inspections revealed the interlock integrity of the sheet piles in numerous instances was severely compromised. MarAd, because it abdicated its responsibilities, never developed, and never took steps to ensure that ICRC or PND developed during the Project the necessary inspection protocols to verify interlock integrity.

67. In addition, at the Wet Barge Berth, damage was present in every cell at face sheets or wyres at cells 27 through 38. During the August-September 2010 timeframe, cells 36 through 38 of the Wet Barge Berth were removed and found to also have tail wall sheet damage.

68. At the North Extension, cells 9 through 12, 31 and 32 were removed in the August-September 2010 timeframe and found to have face and tail wall sheet damage. Further, cells 41 through 66 of the North Extension were found to have damage throughout the entire area, and cells 38 through 40 were also found to have face and tail wall damage.

69. Additionally, during excavation of fill placed by QAP at North Extension Cells 38 and 39, debris, including pieces of wood, steel scrap, steel sheet pile, and other foreign material was discovered in the fill.

MarAd Makes No Attempt To Hold ICRC And Its Designers And Contractors Responsible For The Defective Work

70. Given the extent of the defective work on the Project, in December 2010, ICRC sent a letter to QAP detailing the nature and extent of QAP's and MKB's deficient work. ICRC's letter also noted the ongoing and accruing damages that were being suffered as a direct result of

QAP's and MKB's work. ICRC's letter demanded that QAP return to the site to perform remedial actions to correct the non-conforming work.

71. ICRC, however, would later revoke its December 2010 demand to QAP to repair and/or remove damaged and non-conforming work on the Project. In addition, ICRC then filed a certified pass-through claim with MarAd on behalf of QAP and MKB.

72. ICRC's pass-through claim was denied by MarAd's Contracting Officer. ICRC then filed an appeal with the Civilian Board of Contract Appeals (the "CBCA Action"), wherein ICRC blamed the state of the Project on PND and MarAd. Even though ICRC was contractually responsible for PND's performance, MarAd never asserted a counterclaim against ICRC for design and construction deficiencies at the Project.

73. On September 28, 2012, MarAd entered into The Negotiated Contract Adjustment Agreement (the "MarAd-ICRC Settlement Agreement") with ICRC settling the CBCA Action with MOA's funds, but without MOA's knowledge or consent. Under the MarAd-ICRC Settlement Agreement, MarAd agreed to pay ICRC \$11,300,000.00 in settlement of the CBCA Action. Moreover, under the MarAd-ICRC Settlement Agreement, ICRC and MarAd agreed to forever release and discharge one another from any and all liability, obligations, and claims, actual and potential, known or unknown, arising out of the contract to perform work at the Project. Thus, MarAd released ICRC of responsibility for the design and construction defects attributable to ICRC and its design and construction professionals.

74. At the same time MarAd was secretly negotiating a settlement with ICRC, MarAd was pretending to work with MOA to reject the ICRC claim and to prepare a counterclaim with MOA's assistance. In addition, MarAd was pretending to attempt to negotiate an extension of

the 2011 MOA-MarAd Agreement with MOA, while at the same time waiving the rights for a counterclaim against ICRC without so much as a discussion with MOA. MarAd never affirmatively took actions to investigate or pursue a counterclaim against ICRC.

75. MOA only learned of the MarAd-ICRC Settlement Agreement from QAP's counsel, and only obtained a copy of the MarAd-ICRC Settlement Agreement after a Freedom of Information Act request was submitted and after MOA made repeated demands to MarAd.

76. MarAd was obligated under the 2011 MOA-MarAd Agreement to pursue affirmative claims against ICRC on MOA's behalf. However, MarAd never took any steps under either the 2003 MarAd-ICRC Contract or the 2008 MarAd-ICRC Contract to require ICRC and its designers and contractors, who ICRC contended were responsible for the failed Project, to take steps at ICRC's own cost to repair the defective design and construction work.

77. MarAd has failed to take such action against ICRC even though ICRC's inability to manage the Project has led to criticism from its own employees, including from ICRC's own Project Manager, who expressed his belief that the "ICRC organization [is] inexperienced, severely dysfunctional, and incapable of managing [the Project] work in a general contractor role competently and in a responsible fashion."

**CH2M Hill's Suitability Analysis Concludes
the Project Has Been Defectively Designed and Constructed**

78. In November of 2011, MarAd entered into an agreement with the United States Army Corps of Engineers ("USACE"), whereby USACE agreed to enter into a contract with CH2M Hill, Inc. ("CH2M Hill"). The USACE-CH2M Hill contract authorized CH2M Hill to provide geotechnical, civil, structural, corrosion, coastal, and construction engineering services

associated with the Project, in accordance with the scope of work defined in USACE Delivery W912PP-09-D-0016 Task Order No. ZJ02.

79. On February 14, 2013, CH2M Hill issued its Final Summary Report (the "Suitability Study") that it had prepared in accordance with its contract with the USACE.

80. CH2M Hill has confirmed in the Suitability Study that other than the Dry Barge Berth, which has been successfully constructed and has adequate factors of safety for structural and global stability, the other sections of the Project -- the Wet Barge Berths and the North Extension -- have dramatic construction defects including twisted sheet piles, unzipped interlocks and design deficiencies that do not meet the adequate factors of safety, rendering these sections of the Project unusable and not able to be repaired.

81. CH2M Hill's Suitability Study details various deficiencies in the Project's administration, design, and construction. These deficiencies include, but are not limited to:

- Producing an OCSF design that is inadequate relative to global stability and seismic displacement based on the Project's design criteria;
- Prescribing that excessively tall sheet piles be driven from a dike on the land side of the wall, which caused significant sheet pile damage as unbalanced soil pressure was exerted on the OCSF wall preventing the contractor from driving the sheet piles straight;
- Failing to establish a qualitative based process for selecting experienced contractors;
- Failing to inform QAP and MKB of issues encountered during the Dry Barge Berth phase of the Project, which impacted their work;
- Prescribing and permitting the use of riprap dikes and large fill materials in the same areas where future pile driving would occur;
- Prescribing use of a land based dike with a 1.5:1 slope that was too steep and negatively impacted the ability to drive the sheet piles successfully;
- Prescribing that a vibratory hammer be employed first until refusal, prior to using the impact hammer contributed to slope movement during construction;

- Directing QAP and MKB to continue to drive piles after practical refusal had been achieved, damaging sheet piles;
- Failing to develop a testing protocol to verify the interlock integrity of driven sheet piles; and
- Ignoring signs that significant problems existed with the sheet pile operation and failing to conduct a rigorous analysis of the problems, which could have mitigated additional and more extensive problems.

MOA Has Been Significantly Damaged As a Result of MarAd's Failure To Perform

82. The Project work is currently on hold, while MOA seeks to obtain a design that is suitable and appropriate for the seismological, geological, hydrological, and environmental conditions unique to the Port, and is otherwise constructible.

83. The completion date for the Project has been significantly pushed back, thereby delaying MOA's planned uses for the expanded Port facilities.

84. MOA has incurred and will continue to incur substantial damages due to MarAd's failure to fulfill its contractual obligations.

85. MOA has provided MarAd to date approximately \$302,000,000.00 in funding, including MarAd's three percent (3%) of all Project funds received, and (except for the Dry Barge Berth) has no marine infrastructure suitable for its intended use.

86. MOA will now have to pay for a completely new design to satisfy its Port expansion objectives since the OCSP design has been deemed unsuitable and irreparable.

87. MOA has lost the benefit of the \$139,000,000.00 in federal funds. MOA will likely have to fund the Project work going forward entirely with state and local funds.

88. MOA will now have to hire a new contractor to construct the new design once it has been completed, and remove or work around the defective work currently in place at the Project.

89. MOA has also lost the use of portions of its property. MOA has also lost revenue and other consequential damages resulting from the delay in the completion of the Project. MOA will incur additional operational and maintenance costs related to the failed Project, and it will incur additional costs associated with the delay in completing this Project.

90. MOA has also incurred significant costs investigating the damage and attempting to repair the damage, and MOA will have to reconstruct the Port using a completely different design and construction methods.

**The Department of Transportation's Office of Inspector General Issued
A Report Documenting MarAd's Failures In Connection With The Project**

91. On August 2, 2013, the Office of Inspector General for the Department of Transportation issued a report documenting MarAd's failure to properly carry out its obligations under the 2003 and 2011 MOA-MarAd Agreements (the "DOT IG Report")

92. The DOT IG Report concluded that in connection with the Project:

- MarAd narrowly interpreted its statutory responsibilities at the Port Expansion Project by limiting its role to obligating and distributing funds for project tasks.
- MarAd did not establish guidance on developing Project Management Plans, including how to define roles and responsibilities.
- MarAd did not develop a risk management process for the Port Expansion Project until almost seven (7) years after the Project began.
- MarAd's inadequate planning, lack of reliable cost estimates, and noncompliance with Federal contract requirements when awarding and administering Project contracts resulted in significant contracting problems.

- MarAd did not establish contract administration plans for the Project to ensure proper monitoring of contracts.
- MarAd did not develop Independent Government Cost Estimates for the Port Expansion Project contracts or ensure that the Project's cost estimates were reliable.
- MarAd allowed the use of a proprietary technology without justification or independent review of the design.
- MarAd did not follow procedures to designate COTRs.
- MarAd did not complete an award fee plan until nearly two (2) years after the contract began. Because it took so long for MarAd to implement an award fee plan, nearly half of the award fee evaluation periods had ended without having in place any evaluation procedures or criteria to assess ICRC's performance.
- MarAd did not properly maintain contract file documentation, including required COTR files.

**MOA Has Exhausted Its Administrative Remedies,
And MarAd Refused To Engage In The Dispute Resolution Process**

93. By letter dated November 15, 2013, Mr. George J. Vakalis, MOA's Municipal Manager, wrote to Mr. Keith Lesnick, Associate Administrator of MarAd, invoking the disputes resolution process set forth in Section XI of the 2011 MOA-MarAd Agreement.

94. By letter dated December 31, 2013, after receiving no substantive response to Mr. Vakalis' November 15, 2013 letter, Mayor Daniel A. Sullivan of MOA wrote to MarAd's Acting Administrator and informed him that, since MarAd had failed to respond, the 2011 MOA-MarAd Agreement now contemplates the Mayor's and Acting Administrator's involvement in resolving MOA's claim.

95. Notwithstanding the Mayor's December 31, 2013 letter, MarAd has still failed and refused to engage in any substantive discussions on the resolution of MOA's claim.

COUNT I

Breach of the 2003 and 2011 MOA-MarAd Agreements

96. MOA re-alleges and reincorporates the allegations contained in all preceding Paragraphs of this Complaint as though fully set forth herein.

97. MarAd executed its two contractual agreements with MOA, the 2003 MOA-MarAd Agreement and the 2011 MOA-MarAd Agreement, with the clear intent to be bound. All the elements of a binding contract were present. Both MarAd and MOA had a mutual intent to contract. MarAd offered, among other things, to provide its technical expertise to design, construct, and oversee the Project, and properly administer contract funds. MOA accepted MarAd's offer and provided consideration for MarAd's services by paying MarAd three percent (3%) of all Project funds MarAd received. The fees MOA paid in consideration of MarAd's services are comparable to what a firm in the private sector would have charged to perform the services MarAd undertook. The Federal Government also obtained usage of a direct road between POA and Elmendorf Air Force Base, a reduced flight path hazard and access to new staging areas for DoD resources. The 2003 and 2011 MOA-MarAd Agreements were properly authorized and executed by government official(s) with authority to bind the United States.

98. MarAd breached the contractual duties owed to MOA under the 2003 and 2011 MOA-MarAd Agreements by, among other things, failing to provide its promised expertise to design, construct, and oversee the design and construction of the Project, resulting in a Project that (except for the Dry Berge Berth) has been rendered useless and not suitable for its intended purposes; failing to manage and oversee the 2003 MarAd-ICRC Contract and the 2008 MarAd-ICRC Contract, the effect of which was that ICRC, PND and other design and construction professionals committed breaches and independent tortious acts which MarAd simply ignored;

failing to exercise its contractual rights against ICRC to repair and replace the defective work at ICRC's own cost; settling ICRC's claim with MOA's funds and without MOA's knowledge or consent even though ICRC first blamed its own contractors, QAP and MKB, for construction defects, and later blamed its own designer, PND, for Project defects; disbursing Project funds for defective work; by otherwise completely abdicating its responsibility to design, construct, and oversee the Project; and by failing to perform its obligations to MOA "in good faith for the benefit of the citizens of the Municipality of Anchorage."

99. MarAd's breaches of the contractual duties owed to MOA are the direct and proximate cause of significant direct and consequential damages MOA has suffered, and will continue to suffer as substantial portions of work performed by MarAd (and paid for by MOA) have been rendered completely unusable, MOA's real property has been damaged, MOA has incurred significant costs investigating the damage and attempting to repair the damage, and MOA will have to reconstruct the Port using a completely different design and construction methods. MOA has already provided MarAd in excess of \$302,000,000.00, and will now have to incur substantial additional amounts, apparently without the benefit of federal funding, to complete the Project, the exact amount of which has not been finally determined.

100. MarAd's breaches of its contractual duties owed to MOA have caused MOA to suffer, and continue to suffer, direct and consequential damages in excess of \$10,000.00, the exact amount to be proven at the time of trial.

COUNT II

Breach of the Implied Covenant of Good Faith and Fair Dealing

101. MOA re-alleges and reincorporates the allegations contained in all preceding Paragraphs of this Complaint as though fully set forth herein.

102. MarAd executed two contractual agreements with MOA, the 2003 MOA-MarAd Agreement and the 2011 MOA-MarAd Agreement.

103. Contracts with the federal government impose upon each party a duty of good faith and fair dealing in their performance and enforcement.

104. MarAd breached the implied covenant of good faith and fair dealing by, among other things, recklessly disbursing MOA funds to ICRC for defective work, failing to enforce its contractual remedies against ICRC, and using \$11,300,000.00 in Project funds to settle the CBCA Action with ICRC without notifying or involving MOA in the settlement process.

105. MarAd also breached the implied duty of good faith and fair dealing by attempting to hide the settlement from MOA and by refusing to participate in the disputes mandated process required by the 2011 MOA-MarAd Agreement.

106. Furthermore, MarAd has breached the implied duty of good faith and fair dealing by failing to pursue a counterclaim against ICRC at any time during either the 2003 MOA-MarAd Agreement or the 2011 MOA-MarAd Agreement and at the time of settlement of ICRC's claim at the CBCA, thereby denying MOA the benefit of the terms of the 2011 MOA-MarAd Agreement which promised that MarAd would pursue affirmative claims against ICRC.

107. As a result of MarAd's breach of the implied covenant of good faith and fair dealing, MOA has suffered, and will continue to suffer, direct and consequential damages in excess of \$10,000.00, the exact amount to be proven at trial.

COUNT III

Breach of the 2003 and 2008 MarAd-ICRC Contracts For Which MOA Was A Third Party Beneficiary

108. MOA re-alleges and reincorporates the allegations contained in all preceding Paragraphs of this Complaint as though fully set forth herein.

109. MarAd executed with ICRC the 2003 MarAd-ICRC Contract and the 2008 MarAd-ICRC Contract. These two contracts provided MarAd with specific rights against ICRC in the event ICRC failed to properly perform its design and construction services on the Project, including, but not limited to, requiring ICRC to pay for defective work, and repair defective work without additional costs.

110. Plaintiff was an intended third party beneficiary of the 2003 MarAd-ICRC Contract, and a specifically expressed third party beneficiary of the 2008 MarAd-ICRC Contract, as MarAd and ICRC clearly intended since the inception of the Project to provide Plaintiff the benefit of MarAd's and ICRC's promised performance under the above-referenced Contracts, including but not limited to MarAd enforcing its rights against ICRC.

111. MarAd breached its contractual duties to MOA by, among other things, failing to enforce its contractual rights against ICRC, and continuing to disburse funds to ICRC for defective work, all as more fully set forth in this Complaint.

112. MarAd's breaches of the contractual duties owed to MOA are the direct and proximate cause of significant direct and consequential damages Plaintiff has suffered, and will continue to suffer as substantial portions of work performed by MarAd (and paid for by MOA) have been rendered completely unusable, MOA's real property has been damaged, MOA has incurred significant costs investigating the damage and attempting to repair the damage, and MOA will have to reconstruct the Port using completely different design and construction methods. MOA has already provided MarAd approximately \$302,000,000.00, and will now have to incur substantial additional amounts to complete the Project, the exact amount of which has not been finally determined, and perform this work without the benefit of the previously expended federal funds.

113. MarAd's breaches of its contractual duties owed to MOA have caused MOA to suffer, and continue to suffer, direct and consequential damages in excess of \$10,000.00, the exact amount to be proven at the time of trial.

PRAYER FOR RELIEF

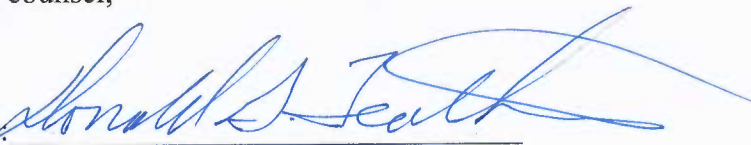
WHEREFORE, MOA respectfully requests that judgment be entered in its favor and against Defendant, United States, in the amount of MOA's damages, in excess of \$10,000.00, the exact amount to be proven at the time of trial, and to further award MOA all costs, fees, and expenses, including attorney's fees and pre-judgment interest, as applicable and in an amount to be proven at trial, plus such other and further relief as the Court deems proper.

DATED this 28th day of February, 2014.

Respectfully submitted,

MUNICIPALITY OF ANCHORAGE,

By counsel,

By: 

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