



Legislation Text

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CITY of ALBUQUERQUE
TWENTY FOURTH COUNCIL

COUNCIL BILL NO. F/S R-21-149 ENACTMENT NO. _____

SPONSORED BY: Isaac Benton

RESOLUTION

A RESOLUTION DECLARING THE INTENT OF THE CITY OF ALBUQUERQUE, NEW MEXICO TO ISSUE INDUSTRIAL REVENUE BONDS ENTITLED CITY OF ALBUQUERQUE, NEW MEXICO INDUSTRIAL REVENUE BONDS (EL ENCANTO, INC. PROJECT), TAX-EXEMPT SERIES 2021, IN AN AGGREGATE PRINCIPAL AMOUNT UP TO \$10,000,000 IN CONNECTION WITH A PROPOSED PROJECT LOCATED IN THE CITY OF ALBUQUERQUE, NEW MEXICO, FOR THE PURPOSE OF INDUCING EL ENCANTO, INC. OR ITS SUCCESSORS OR ASSIGNS, TO ACQUIRE, CONSTRUCT AND EQUIP THE PROJECT AND TO REIMBURSE TEMPORARY ADVANCES MADE FOR CAPITAL EXPENDITURES FROM PROCEEDS OF THE BONDS AND RELATED MATTERS.

WHEREAS, the New Mexico legislature has passed the "Industrial Revenue Bond Act" (the "Act"). Sections 3-32-1 to 3-32-16 inclusive et seq., NMSA 1978 as amended, which authorizes the City of Albuquerque, New Mexico (the "City") to issue industrial development bonds and to acquire projects as defined in the Act; and

WHEREAS, the City desires to promote industry and develop trade or other economic activity to secure and maintain a balanced and stable economy in the City and to promote public health, welfare, safety, convenience and prosperity; and

WHEREAS, El Encanto, Inc., a New Mexico corporation (together with its successors and assigns, the "Company"), has made a proposal to the City (the "Proposal") whereby the City will acquire land, buildings and equipment located in the City, which will constitute an industrial development project (the "Project"); and

WHEREAS, the issuance of its industrial revenue bonds (the "Bonds") by the City to finance all or a part of the Project, will constitute one of the inducements whereby the Company will determine to acquire land and acquire, construct and equip a facility in the City; and

WHEREAS, the City Council (the "Council") of the City constitutes the governing body of the City within the meaning of the Act; and

WHEREAS, the Project has been considered by the Council and it has been concluded that the Proposal and Project will promote the local health, general welfare, safety, convenience and prosperity of the inhabitants of the City, and the Council desires to indicate its intent to proceed with the issuance of the Bonds for the financing of the Project; and

WHEREAS, concurrently with the issuance of the Bonds, the Company will enter into a leasing or other financing agreement with the City providing for the payment of lease rentals or other payments on the Project sufficient to pay the debt service on the Bonds, subject to the prior adoption by the Council of an ordinance (the "Bond Ordinance"); and

WHEREAS, pursuant to Section 1.150-2 of the Treasury Regulations (the "Regulations", promulgated under the Internal Revenue Code of 1986, as amended (the "Code")), the issuer of "private activity bonds," within the meaning of the Code, may make a declaration of official intent with respect to expenditures relating to a project to be financed with tax-exempt private activity bonds under the Code, thereby allowing a borrower such as the Company to reimburse itself out of the proceeds from the sale of tax-exempt private activity bonds for expenditures made within sixty (60) days prior to the declaration of official intent; and

WHEREAS, in order for the Bonds to be issued as tax-exempt private activity bonds, the City must apply for and receive from the New Mexico State Board of Finance an allocation of "private activity bond volume cap" in an amount equal to the par amount of the Bonds to be issued as tax exempt private activity bonds; and

WHEREAS, the New Mexico State Board of Finance requires that an application for volume cap be accompanied by a copy of an inducement resolution, certified by an official of the City; and

WHEREAS, this resolution, as it expresses the intent of the City to issue the Bonds, is intended to be the inducement resolution required to be submitted to the New Mexico State Board of Finance; and

WHEREAS, the City and the Company understand that the adoption of this Resolution shall not obligate the City to issue the Bonds except in full compliance with the terms of the Bond Ordinance adopted by the City prior to the issuance of the Bonds and related bond documents in form satisfactory to the City.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. All actions (not inconsistent with the provisions hereof) heretofore taken by the Council and the officers and employees of the City, related to the Proposal, the acquisition, construction and improvement of the Project, and the sale and issuance of the Bonds therefore, be and the same hereby are ratified, approved and confirmed.

Section 2. The Council understands the following:

- A. The Project will consist of the construction and improvement of a 25,000 square foot freezer on approximately 26.3 acres of land.
- B. The maximum aggregate face amount of obligations to be issued with respect to the Project is \$10,000,000.
- C. The initial developer of the land and buildings for the Project will be the Company.
- D. The initial operator of the Project will be the Company.
- E. The location of the Project is at 2001 4th Street SW in Albuquerque, New Mexico.

Section 3. In order to promote the local health and general welfare, safety, convenience and prosperity of the inhabitants of the City, it is the Council's intent to take all necessary and advisable steps to effect the issuance of the Bonds in an aggregate principal amount up to \$10,000,000 in order to defray part or all of the costs of the Project. The Bonds, in one or more series, are to be entitled substantially as follows "City of Albuquerque, New Mexico Industrial Revenue Bonds (El Encanto, Inc. Project), Tax-Exempt Series 2021." The Company intends that the Bonds to be used to finance the Project are to be "qualified private activity bonds" within the meaning of the Code, the interest on which is to be excludable from gross income for federal income tax purposes under Section 103 of the Code. This expression of the Council's intent is conditioned upon the issuance of the Bonds on or before one year from the date of the adoption of this Resolution.

Section 4. The City hereby declares its intent to reimburse, or to cause the Company to reimburse from the proceeds of the Bonds, all "original expenditures," within the meaning of Section 1.150-2(c) (1) of the Regulations, made by or on behalf of the Company. Subject to the provisions of Section 9 below with regard to the adoption of the Bond Ordinance, the City hereby finds that its expectations of making, or of having the Company make, a "reimbursement allocation," within the meaning of Section 1.150-2(c) (1) of the Regulations, with respect to all original expenditures made by or on behalf of the Company with respect to the Project, are reasonable in that it has received assurances from the Company that the Project has been developed and approved by the Company, plans and specifications are under preparation and the Company has already made significant expenditures with respect to the Project, and that the Company presently intends and reasonably expects to participate in a taxable or tax-exempt borrowing within 18 months of the date of the expenditure of moneys on the Project or the date upon which the Project is placed in service or abandoned (but in no event more than three years after the date of the original expenditure of such moneys), and to allocate a portion of the proceeds thereof to reimburse the Company for its actual expenditures in connection with the Project. The Council has been advised that all of the capital expenditures covered by this Resolution were made not earlier than 60 days prior to the date of this Resolution or will be made after the date of this Resolution but prior to the issuance of the Bonds.

Section 5. The Council, with the assistance of the Company and bond counsel, will cause a public hearing to be conducted on the issuance of the Bonds after reasonable public notice in accordance with Section 147(f) of the Code. The City hereby designates as "hearing officer," within the meaning of Section 5f.103-2 at the Regulations anyone or more of (i) the members of the Council sitting and present at a meeting called for the purpose of holding a public hearing for such purpose, or (ii) the City 's Chief Administrative Officer , to conduct a "public hearing," within the meaning of that Section, with respect to the Project, and bond counsel is hereby authorized and directed to take all such actions as may be reasonable or necessary to schedule and cause the public hearing to be conducted. Additionally, upon request of the Company and bond counsel, the City will assist the Company in making an application for an appropriate allocation of the "private activity bond volume cap," within the meaning of and as required by Section 146 of the Code, as such allocations are governed by Section 6-20-1 et seq., NMSA 1978, as amended, and regulations of the New Mexico State Board of Finance.

Section 6. The Bonds **issued** for the acquisition, construction and improvement of the Project shall be payable from the revenues of the Project or other moneys payable by the Company, with respect thereto, and shall not constitute a debt or indebtedness of the City within the meaning of any provision or limitation of the Constitution or statutes of the State of New Mexico. In addition, if the Bonds are issued, the Company shall indemnify and hold harmless the City, the Council and their respective officers, employees, designated representatives and agents (collectively, the "Indemnified Persons") from and against any liability to the Company, or to any third parties that may be asserted against the City with respect to the City's ownership of or leasehold interest in the Project or the issuance of the Bonds. Nothing contained in this Resolution or in any other instrument shall be considered as obligating the City to any pecuniary liability or a charge upon the general credit of the City or against its taxing power, it being understood that no costs are to be borne by the City and that all costs incurred by the City in connection with the Bonds are to be promptly reimbursed by the Company,. The City's adoption of this Resolution shall not be deemed a conclusion or expression of approval by the City or any Indemnified Person of the Company or the Project.

Section 7. The Company as agent for the City and consistent with Taxation and Revenue Department Regulation 3.2.212.22 NMAC Renumbered, will acquire the Project. The Company will, as agent for the City, consistent with New Mexico State Law, request delivery of Type 9 Nontaxable Transaction Certificates ("Certificates") from the Taxation and Revenue Department. The Company will deliver a Certificate to each person selling tangible personal property to the Company for the Project as applicable under the New Mexico Gross Receipts and Compensating Tax Act. For this purpose, by adoption of this Resolution, the City authorizes the Company to act as agent for the City. The Company shall not use the Certificates other than for the purchase of capital equipment and other tangible personal property, nor shall the Company use such Certificates after the completion of the Project. Prior to the use of such Certificates by the

Company as agent for the City, the City Chief Administrative Officer and the Company will agree to certain procedures regarding the use of the Certificates and protection of the City from any unfunded tax liability.

Section 8. The City intends to enter into an agreement with the Company pursuant to which the Company will pay to the City certain annual payments in lieu of ad valorem taxes levied on the Project property (such annual payments to be based upon the cost of the Project and the mill levies established from time to time), and such agreement shall be included in a lease to be entered into by the City and the Company.

Section 9. The City Councilors and other appropriate City officials and employees are hereby authorized and empowered to take such steps and to do such things as may be necessary to achieve the purposes of this Resolution; provided, however, the issuance of the Bonds and the execution and delivery of any documents to which the City is a party in connection therewith shall be subject to the approval and authorization of the Council pursuant to the Bond Ordinance, to be adopted following public notice of the Council's intent to adopt such Ordinance at least fourteen (14) days prior to the consideration of the Ordinance by the Council at a public meeting, such public notice to specify the time, date and place of the Council's meeting. In particular, no provision of this Resolution shall in any way obligate the City or any other person to issue the Bonds, any other bonds or in any way finance the Project; and the City retains full and complete discretion with respect thereto.

Section 10. This Resolution shall not give rise to a pecuniary liability of the City and shall not give rise to a charge against its general credit or taxing powers.

Section 11. The issuance of the Bonds and the execution and delivery of any documents to which the City is a party in connection therewith shall be subject to the approval and authorization by the Council pursuant to the Bond Ordinance following reasonable public notice of the time, date and place of the public hearing to be held on the proposed adoption of the Bond Ordinance. In connection with this Resolution, the Council understands that the Company is not obligated to proceed with the Project, and, additionally, the Council has been informed that a failure or refusal of the Council, however arising, to adopt the Bond Ordinance will have the effect of voiding any benefits to the Company under the Act, including revoking the authority of the Company to act as agent for the City in connection with the solicitation of nontaxable transaction certificates for the Project from Taxation and Revenue, voiding the nontaxable transaction certificates issued to the Company for Project purchases and making such purchases subject to whatever tax would be due if such certificates had not been issued.

Section 12. If any section, paragraph, clause or provision of this Resolution shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining provisions of this Resolution.

Section 13. All orders and resolutions, or parts thereof in conflict with this Resolution are hereby

repealed; this repealer shall not be construed to revive any order, resolution or part thereof, heretofore repealed.

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