

**ALASKA STATE LEGISLATURE
HOUSE RULES STANDING COMMITTEE**

May 6, 2001
12:40 a.m.

MEMBERS PRESENT

Representative Pete Kott, Chair
Representative Brian Porter
Representative Vic Kohring
Representative Carl Morgan
Representative Lesil McGuire
Representative Ethan Berkowitz
Representative Reggie Joule

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Norman Rokeberg
Senator Jerry Ward

COMMITTEE CALENDAR

SENATE BILL NO. 152

"An Act relating to the handling of and interest on contract controversies involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies."

- MOVED HCS SB 152(RLS) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: SB 152

SHORT TITLE:DOTPF-RELATED CONTRACT CLAIMS

SPONSOR(S): SENATOR(S) COWDERY

Jrn-Date	Jrn-Page		Action
03/20/01	0735	(S)	READ THE FIRST TIME - REFERRALS
03/20/01	0735	(S)	TRA
04/10/01		(S)	TRA AT 1:30 PM BUTROVICH 205
04/10/01		(S)	Moved Out of Committee

			MINUTE(TRA)
04/11/01	1067	(S)	TRA RPT 4DP
04/11/01	1067	(S)	DP: COWDERY, TAYLOR, WILKEN, WARD
04/11/01	1067	(S)	FN1: INDETERMINATE(DOT)
04/11/01	1067	(S)	FIN REFERRAL ADDED AFTER TRA
04/24/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/24/01		(S)	FIN AT 6:00 PM SENATE FINANCE 532
04/24/01		(S)	Moved Out of Committee MINUTE(FIN)
04/25/01	1258	(S)	FIN RPT 5DP 1DNP 1NR
04/25/01	1258	(S)	DP: DONLEY, KELLY, WILKEN, WARD, LEMAN;
04/25/01	1258	(S)	DNP: HOFFMAN; NR: OLSON
04/25/01	1258	(S)	FN1: INDETERMINATE(DOT)
04/25/01	1258	(S)	FN2: INDETERMINATE(CED)
04/26/01	1278	(S)	RULES TO CALENDAR 1OR 4/26/01
04/26/01	1283	(S)	READ THE SECOND TIME
04/26/01	1283	(S)	ADVANCED TO THIRD READING UNAN CONSENT
04/26/01	1283	(S)	READ THE THIRD TIME SB 152
04/26/01	1284	(S)	PASSED Y14 N5 A1
04/26/01	1284	(S)	ELLIS NOTICE OF RECONSIDERATION
04/26/01		(S)	RLS AT 10:45 AM FAHRENKAMP 203 MINUTE(RLS)
04/27/01	1310	(S)	RECONSIDERATION NOT TAKEN UP
04/27/01	1311	(S)	TRANSMITTED TO (H)
04/27/01	1311	(S)	VERSION: SB 152
04/28/01	1296	(H)	READ THE FIRST TIME - REFERRALS
04/28/01	1296	(H)	FIN
04/30/01		(H)	FIN AT 1:30 PM HOUSE FINANCE 519
04/30/01		(H)	Heard & Held MINUTE(FIN)
05/03/01		(H)	FIN AT 1:30 PM HOUSE FINANCE 519
05/03/01		(H)	Moved HCSSB 152(FIN) Out of Committee MINUTE(FIN)
05/04/01	1528	(H)	FIN RPT HCS(FIN) 5DP 1NR
05/04/01	1528	(H)	DP: LANCASTER, WHITAKER, HARRIS,

05/04/01	1528	(H)	DAVIES, MULDER; NR: BUNDE
05/04/01	1529	(H)	FN1: INDETERMINATE(DOT)
05/04/01	1529	(H)	FN2: INDETERMINATE(CED)
05/06/01	1585	(H)	RLS RPT HCS(RLS) 3DP 3NR 1AM
05/06/01	1585	(H)	DP: PORTER, MCGUIRE, KOHRING;
05/06/01	1585	(H)	NR: MORGAN, JOULE, KOTT;
05/06/01	1585	(H)	AM: BERKOWITZ
05/06/01	1585	(H)	FN1: INDETERMINATE(DOT)
05/06/01	1585	(H)	FN2: INDETERMINATE(CED)
05/06/01		(H)	RLS AT 0:30 PM BUTROVICH 205

WITNESS REGISTER

SENATOR JOHN COWDERY
 Alaska State Legislature
 Capitol Building, Room 101
 Juneau, Alaska 99801
 POSITION STATEMENT: Testified as the sponsor of SB 152.

DOUG GARDNER, Assistant Attorney General
 Transportation Section
 Civil Division (Juneau)
 Department of Law
 PO Box 110300
 Juneau, Alaska 99811-0300
 POSITION STATEMENT: Testified on SB 152.

DENNIS POSHARD, Legislative Liaison/Special Assistant
 Office of the Commissioner
 Department of Transportation & Public Facilities
 3132 Channel Drive
 Juneau, Alaska 99801-7898
 POSITION STATEMENT:

ACTION NARRATIVE

TAPE 01-16, SIDE A
 Number 0001

CHAIR PETE KOTT called the House Rules Standing Committee meeting to order at 12:40 a.m. Representatives Kott, Porter, Kohring, Morgan, Berkowitz, and Joule were present at the call to order. Representative McGuire arrived as the meeting was in progress. Also in attendance were Representative Rokeberg and Senator Ward.

SB 152-DOTPF-RELATED CONTRACT CLAIMS

CHAIR KOTT announced that the only order of business before the committee would be SENATE BILL NO. 152, "An Act relating to the handling of and interest on contract controversies involving the Department of Transportation and Public Facilities or state agencies to whom the Department of Transportation and Public Facilities delegates the responsibility for handling the controversies."

Number 0051

REPRESENTATIVE PORTER moved to adopt HCS SB 152 [22-LS0552\J] as the working document before the committee.

REPRESENTATIVE BERKOWITZ objected and requested an explanation of the differences between the two versions.

CHAIR KOTT pointed out that Section [4 of HCS SB 152(FIN)] was deleted. In further response to Representative Berkowitz, Chair Kott said that the section was deleted because "we" don't like it.

REPRESENTATIVE BERKOWITZ said that others do like the deleted section.

CHAIR KOTT said that once the HCS is adopted, then the rationale for the deletion of the section could be discussed.

REPRESENTATIVE BERKOWITZ expressed his concern for showing the appropriate deference to the House Finance Committee, which went to a lot of trouble to develop a version that committee liked. However, now the House Rules Standing Committee is going to change it. Therefore, he felt there should be some explanation.

CHAIR KOTT reiterated that once the HCS is adopted, there would be an explanation.

Number 0161

REPRESENTATIVE BERKOWITZ withdrew his objection. Therefore, version J was before the committee.

Number 0194

SENATOR JOHN COWDERY, Alaska State Legislature, testified as the sponsor of SB 152. Senator Cowdery said that he worked on this

bill with the industry and the Department of Transportation & Public Facilities (DOT&PF) in arriving at the language that was sent from the Senate. Therefore, he urged the passage of the original bill, SB 152.

REPRESENTATIVE BERKOWITZ inquired as to the problem that this bill is trying to fix. He asked if Senator Cowdery could give some examples.

SENATOR COWDERY said, "If it's not broke, we don't have to fix it. I don't think it's broke."

REPRESENTATIVE BERKOWITZ inquired as to why there is a bill then.

Number 0265

SENATOR COWDERY said, "Why do we want the government to pay interest on claims that a court says is valid. I think that you have anything to do with any financing that you're going to have to pay interest on the money and that's all we after in this. Just because the claim doesn't need the interest, it's the court that decides it was a valid claim, and it's basically that." Senator Cowdery said this legislation will provide an incentive to settle claims.

REPRESENTATIVE BERKOWITZ related his understanding that the bill attempts to address the problem of contractors incurring costs that they shouldn't be.

SENATOR COWDERY clarified that what he is saying is that the courts make that decision. He emphasized that he isn't saying that all claims of contractors should be paid. He specified, "I'm saying when the court, in a lawsuit, decides ... and awards it to the contractor that then the interest should be paid from the time of the claim."

REPRESENTATIVE BERKOWITZ related his understanding that currently interest accrues from the time of judgment.

SENATOR COWDERY explained that was the case until the [Knowles] Administration. In further response to Representative Berkowitz, Senator Cowdery said that he couldn't provide any specific examples. However, lots of people, such as the Associated General Contractors, small business people, and the trucking industry, came forward wanting to resolve this problem.

Number 0423

CHAIR KOTT asked if anyone came forward during the committee process and announced that they had been harmed by the lack of this bill.

SENATOR COWDERY replied yes and noted that there are pending cases. Furthermore, there were some that wanted to make this retroactive, although [SB 152] does not.

CHAIR KOTT turned to the House Finance Committee amendment that added Section 4. He asked if Senator Cowdery recalled the discussion surrounding that amendment.

SENATOR COWDERY answered that he didn't. He related his belief that other amendments were also discussed in the House Finance Committee.

CHAIR KOTT pointed out that the bill was reported from the House Finance Committee with five "Do Pass" recommendations and one "No Recommendation."

Number 0571

REPRESENTATIVE KOHRING related his understanding that Senator Cowdery supported the proposed House Rules Standing Committee CS, but he didn't support the House Finance Committee CS.

CHAIR KOTT clarified that the proposed House Rules Standing Committee CS essentially returns to the language of SB 152 that was transmitted to the House.

REPRESENTATIVE JOULE related his understanding that prior to the [House Finance Committee] amendments, this legislation was headed to a subcommittee, which probably meant that it would have been held through the summer. He asked if Senator Cowdery had any knowledge of that.

SENATOR COWDERY said that he hadn't heard that until five seconds ago.

CHAIR KOTT asked if Representative Joule was suggesting that was the discussion that occurred in the House Finance Committee.

REPRESENTATIVE JOULE replied yes.

CHAIR KOTT noted that the committee should have a document from the [Department of Law] dated May 5, 2001.

Number 0708

DOUG GARDNER, Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law (DOL), turned to the original bill, which proposed to pay interest on contract claims. Currently, the state hasn't waived its sovereign immunity with respect to the payment of interest on administrative claims and that position has been defended in court. Although this issue is currently headed to the supreme court, the judges to date have agreed that the state hasn't waived its sovereign immunity with respect to interest on administrative claims. The original bill would [require] the interest to be paid from the time the claim was submitted. However, the Attorney General had serious concerns with that due to [the office's] own experience with the claims process. The [Attorney General] felt that there is a severe imbalance between paying interest on claims from the day they're filed, when the complete claim is often not received until late in the process. He specified, "The major concern was that: 'How can the people of the state of Alaska have interest running against them when they don't know the full parameters of the claim that may be hanging over their heads,' if you will."

MR. GARDNER explained that in the House Finance Committee, Representative Davies offered an amendment to SB 152, which would add language to AS 36.36.025. The language that was added was as follows: "An appeal by a contractor of the Department of Transportation and Public Facilities may not raise any new factual issues or theories of recovery that were not presented to and decided by the procurement officer." On the other hand, the contracting community was concerned that DOT&PF wasn't paying claims quickly enough. He explained that when a contractor has to pay to do the job, the contractor has to pay for it and claim for it later. Therefore, the contractors were concerned that this cost them interest and thus why should the contractor pay for it when the state may ultimately be found responsible for paying for it. Representative Croft offered an amendment in the House Finance Committee that said, "that a complete claim is filed that meets the requirements of AS 36.30 through the date of the decision by the procurement officer." The department testified in support of the amendments from Representative Davies and Representative Croft because it balanced the payment of interest.

Number 0873

MR. GARDNER said that if the contracting community wants to get these claims paid quickly and fairly, it would be in the contracting community's interest to put their documents on the table. Typically, the contracting community will code costs associated with the claims in a way that those costs can be tracked. If that information is provided at the beginning of the process, then the department has the ability to make a better decision and pay something that it needs to. Then, if there is a dispute, the department would understand that interest would accrue. Mr. Gardner said that he spoke with both the Attorney General and Commissioner Perkins who both feel that there is a good balance [in CSSB 152(FIN)]. In regard to the retroactivity issue, Dr. Gardner said that he wouldn't address that because he didn't believe that question remains.

MR. GARDNER informed the committee that if this bill passes, interest accrues at 3 percent above the prime, which is calculated on January 2 of each year. He related [the department's] belief that "they" will be fully compensated with interest and thus balancing that with the full documentation of claims is fair for all parties. Such a path should accelerate the process and prevent the long litigation of claims that often occurs later. He noted that sometimes the department doesn't see the full claim until the hearing officer stage, which he didn't believe benefits the contractor or the state.

Number 0995

REPRESENTATIVE BERKOWITZ asked if the language in the section in question [mirrors] the federal standards.

MR. GARDNER answered that DOL feels that HCS SB 152(FIN) is very consistent with what the federal law would require as it requires the payment of interest, a full claim, and disallows a claim later in the process. He said, "I think the answer is yes to your question."

REPRESENTATIVE BERKOWITZ posed a scenario in which the state had a contract controversy with a contractor. He inquired as to the point at which prejudgment interest would begin to accrue.

MR. GARDNER specified that under HCS SB 152(FIN), [prejudgment interest] would begin to accrue from the time that a complete claim is filed with the procurement officer. Under the proposed

House Rules Standing Committee CS, he believes the [prejudgment interest] would begin on the date the claim is filed.

REPRESENTATIVE BERKOWITZ clarified that he was referring to a situation in which the state pursued an action against a contactor.

MR. GARDNER suggested that [the state] would be bound by the same requirements as the contracting community. He wasn't sure whether such claims had been brought by [the state] before and whether those claims had been brought to the procurement officer. However, he reiterated his belief that [the state] would be bound by the same requirements as the contracting community.

Number 1087

REPRESENTATIVE BERKOWITZ inquired as to the general standard for when prejudgment interest begins to accrue with a contract controversy.

MR. GARDNER answered that for a regular contract controversy in superior court, interest would begin to accrue the date the claim was filed.

REPRESENTATIVE BERKOWITZ related his understanding then that the interest would begin to accrue at the time the claim was filed versus the time the breach occurred.

MR. GARDNER said that he guessed it would be dependent upon how it was plead, but he wasn't exactly sure. However, he reiterated his belief that [the interest would begin to accrue] at the time the claim is filed [or rather] the time when one is noticed that there is a claim.

Number 1142

REPRESENTATIVE McGUIRE returned to Mr. Gardner's opinion that the amendment made in the House Finance Committee would speed up the process. Representative McGuire saw [the amendment] as adding another step, a discovery phase, which she indicated would add more time to the process. Therefore, she inquired as to why Mr. Gardner believes HCS SB 152(FIN) would expedite the process.

MR. GARDNER answered that he believes there will always be some discovery because that is part of the due process afforded to

people. Based on "our" experience with the process, a complete claim at the beginning may negate the need to have experts to fight the claim. Mr. Gardner related his belief that much of the discovery and lengthy claims come from the department receiving an entirely new claim during the hearing officer process. He used the Kennicott claim as an example of the aforementioned problem. However, he noted that most of these claims are not like the Kennicott claim but rather smaller. He recalled DOT&PF testifying in the House Finance Committee that over 80 percent of their claims are resolved before entering into the hearing officer process. Therefore, this bill is addressing a very narrow volume of claims because most of the documents can be reviewed by DOT&PF engineering staff to determine whether to pay or not pay the claims. He reiterated that there will have to be a discovery stage and no one is trying to circumvent that process. Mr. Gardner informed the committee that there are many situations in which DOT&PF calls DOL to review a claim [because] it appears that all the information isn't present. There is no way to make the contractor provide more information. Therefore, sometimes [the lack of information] forces the situation into a full-blown discovery process during which litigation strategy can become involved.

REPRESENTATIVE MCGUIRE noted her opinion that it defies logic to suggest that a contractor would withhold information that would assure that contractor prejudgment interest. Therefore, she believes that the incentives are in place to present that information, if it's going to benefit the contractor.

MR. GARDNER related his opposing belief. He said, "If interest is running and there's no requirement to give us a report that may describe things that are both good and bad for the contractor, why would the contractor want to give that to us. That's our dilemma."

MR. GARDNER, in response to Representative Berkowitz, explained that he believes if SB 152 doesn't pass, there will be discussions between DOT&PF and DOL regarding how these cases are dealt with. This legislation has highlighted this claims process and thus he suspected that the process would be sped up due to the level of discussion that there has been. He specified that if SB 152 doesn't pass, the current law will remain the same and the [state] won't pay interest on administrative claims.

Number 1422

REPRESENTATIVE PORTER related his understanding that under the current law, a contractor could add additional information to their claim on appeal.

MR. GARDNER explained that [under the current law] there is invariably new additional information and theories of recovery, which [DOL] considers a new claim, before the hearing officer. Although [DOL] has argued that shouldn't be allowed, they haven't had much success in that area. Therefore, "we" will continue to receive new claims at the hearing officer stage.

REPRESENTATIVE PORTER related his understanding that Mr. Gardner was saying that for the state to consider paying prejudgment interest, the ability to add new information should be eliminated.

MR. GARDNER clarified that there should be a complete claim before the department.

Number 1518

MR. GARDNER asked if Representative Joule was asking whether a small contractor in a rural community would be able to provide DOL with the claim information that it needs under the bill as drafted. To that question, Mr. Gardner said the answer would be yes.

REPRESENTATIVE JOULE clarified that he was referring to the current system. He asked whether [small contractors] who bring claims for necessary cost overruns would be able to recapture some of [those cost overruns] under the current system. He then directed attention to the House Finance Committee CS that wouldn't allow a claim to be changed.

MR. GARDNER addressed the current system first. Under the current system, if the small contractor filed a claim and it took a substantial amount of time to develop the claim, the small contractor wouldn't receive interest during that period. Therefore, Mr. Gardner felt that the current system is probably a bit more burdensome than the new system would be. He said that most of the claims on smaller projects from rural contractors are some of the best-documented claims because the claims are up-front and the jobs are usually not massive. Usually, those claims are easy for DOT&PF to deal with. He said that those claims usually are not the claims that are part of the claims process.

MR. GARDNER, in response to Representative Joule, specified that a big job would be a \$5 to \$15 million road job, while a smaller job would be a \$200,000 to \$1 million job.

MR. GARDNER addressed the new system [as proposed in the bill]. Under the new system, he suggested that a smaller contractor who provides the department with a complete claim quickly would be able to get interest running. Therefore, if there is some dispute, the smaller contractor would be better able to weather a dispute process than under the current system.

Number 1674

MR. GARDNER informed the committee of his experience that DOT&PF doesn't like claims, but rather they like to pay claims and pay them fairly quickly. This desire to pay the claims is reflected in the over 80 percent success rate of claim resolution at the contracting officer stage.

REPRESENTATIVE JOULE inquired as to the claim process for companies that are doing business that is not state business.

MR. GARDNER explained that there could possibly be a dispute mechanism in the contract that would have to be used. However, if that didn't work out, then the next likely step would be a suit in superior court that would probably have a fairly lengthy hearing process. In further response to Representative Joule, Mr. Gardner didn't believe that the committee needed to deal with that because it is currently dealt with under civil rules and the normal litigation process.

REPRESENTATIVE JOULE asked if "we" are looking at being in line with the current practices outside of contracting with the state.

MR. GARDNER said he believes so. He pointed out that the administrative process that DOT&PF has been focused on is similar to the process in a commercial contract that includes an alternative dispute resolution mechanism. If there is a private contract, most parties include a mechanism to resolve the dispute short of going to court. Mr. Gardner related the desire to resolve these cases before expensive litigation ensues. On behalf of DOT&PF, DOL would like DOT&PF to deal with these claims themselves. Therefore, [DOL] wants to see this process resolved in the alternative dispute resolution phase, which is ultimately the administrative claims and thus "we" want complete

claims. Mr. Gardner emphasized that DOL doesn't want to have situations in which it can't appropriately advise DOT&PF because all the information hasn't been provided and isn't provided until later.

CHAIR KOTT asked if the language added to Section 2 in the House Finance Committee was ever addressed.

MR. GARDNER replied yes. He recalled that there was a considerable amount of dialogue on [the amendment].

Number 1860

DENNIS POSHARD, Legislative Liaison/Special Assistant, Office of the Commissioner, Department of Transportation & Public Facilities, said that the department is very supportive of the concept of paying interest to contractors when a dispute resolution ends in favor of the contractor. He informed the committee that DOT&PF strongly supports HCS SB 152(FIN). If the department is going to take on the responsibility of paying interest to the contractors that should be balanced with receiving a full record, which would allow the department to make a good decision in regard to the validity of the claim. The department believes that HCS SB 152(FIN) is consistent with federal law and strikes a balance between the payment of interest and an expedited process as well as providing the fairness needed.

Number 1933

REPRESENTATIVE McGUIRE asked if Mr. Poshard was aware of the federal procurement code requirement that allows the payment of post claim increases if new information arises.

MR. POSHARD answered that he was aware of that to some degree. He related his belief that there is a small provision to raise a claim based on new facts, but he didn't believe that new theories of recovery were allowed. He informed the committee that his discussions with DOL have indicated that DOL doesn't believe that this language necessarily presents that. Mr. Poshard posed a situation in which a contractor submits a formal claim regarding some work on a particular project that required him to lease two D8 Cats. However, if, through the process, it is discovered that this contractor leased two D9 Cats, which are larger equipment that cost more, then the department could reasonably adjust that because the contractor presented the fact that he had two pieces of equipment on lease.

REPRESENTATIVE MCGUIRE emphasized her belief that the language is relatively clear and narrow and says "no new factual issues." Therefore, she encouraged some thought be given to that.

Number 2004

REPRESENTATIVE KOHRING turned to Mr. Poshard's earlier comment regarding the department's desire to pay claims and asked why this legislation is necessary and why the department didn't pay interest on claims in the past.

MR. POSHARD explained that up until a few years ago, DOT&PF paid interest on some cases that had gone to the hearing officer level. He noted that no interest was paid on claims that were resolved at the contracting officer level or anything dealt with in the field by the project manager. However, DOL realized that DOT&PF was paying that interest in error because there was no statutory basis for the department to be required to pay that interest. There has been litigation over the payment of interest and in fact, there is litigation that is heading to the supreme court. Up to this point, the courts have found in favor of the state not having to pay interest. However, Mr. Poshard reiterated that DOT&PF supports changing the law to pay interest because it is the correct and fair thing to do and thus SB 152 is before the committee.

Number 2080

REPRESENTATIVE PORTER related his belief that this is straightforward situation. This is a public policy decision. Although Representative Porter appreciated [the department's support of paying interest], the fact remains that the state wouldn't be paying any prejudgment interest if SB 152 hadn't been filed. Representative Porter said he believes it to be ridiculous that the state took a position not to pay prejudgment interest when every other entity in this state has to do so. He related his belief that this extremely restrictive [language in HCS SB 152(FIN)] wouldn't even allow the state to allow new information. Therefore, he supported the proposed House Rules Standing Committee CS.

Number 2143

REPRESENTATIVE BERKOWITZ related his understanding of the testimony to be that the state would now be in the same position as anyone else in a contractual dispute and thus prejudgment

interest would begin to accrue at the time an action is filed. He said he would be willing to reevaluate his position if his understanding is incorrect. Representative Berkowitz said that the state should be in no different position than anyone involved in a contractual dispute nor should the state be subject to harsher penalties.

Number 2198

REPRESENTATIVE KOHRING moved to report HCS SB 152 [22-LS0552\J] out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HCS SB 152(RLS) was reported from the House Rules Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Rules Standing Committee meeting was adjourned at 1:25 p.m.