

ALASKA STATE LEGISLATURE
SENATE TRANSPORTATION COMMITTEE

Anchorage, AK
February 22, 2002
10:04 a.m.

MEMBERS PRESENT

Senator John Cowdery, Chair
Senator Robin Taylor
Senator Gary Wilken
Senator Kim Elton - (teleconferencing from Juneau)

MEMBERS ABSENT

Senator Jerry Ward, Vice Chair

COMMITTEE CALENDAR

Problems Associated with the Construction Claim Processes Set
Forth in Alaska Procurement Code

PREVIOUS COMMITTEE ACTION

No previous action recorded.

WITNESS REGISTER

David Eberle, Regional Director
Department of Transportation and Public Facilities
P.O. Box 196900 m/s 2525
Anchorage, AK 99519-6900

Gordon Keith, Director Construction and Operations,
Department of Transportation and Public Facilities
P.O. Box 196900 m/s 2525
Anchorage, AK 99519-6900

Mark O'Brien, Chief Contracts Officer
Department of Transportation and Public Facilities
3132 Channel Dr.
Juneau, AK 99801-7898

Dick Cattnach, Executive Director
Associated General Contractors
No address given

Sam Baker, Attorney

Oles Morrison and Rinker and Baker
745 W. 4th Ave. Suite 502
Anchorage, AK

Kevin Brady
Oles Morrison and Rinker and Baker
745 W. 4th Ave. Suite 502
Anchorage, AK

Linda N. Silenski Henrikson, President and CEO
Linder Construction Inc.
8220 Petersburg
Anchorage, AK

D.J. Whitman, General Manager
Seward Ship Drydock
P.O. Box 944
Seward, AK 99664

Jerry Koenig, Project Manager
Swalling Construction Co.
235 F St.
Anchorage, AK 99501

Andy Romine, Operations Manager
Swalling Construction Co.
235 F St.
Anchorage, AK 99501

Jim Psenak, Owner
Jim Psenak Construction
No address given

Dan Libbey, Attorney
Oles Morrison and Rinker and Baker
745 W. 4th Ave. Suite 502
Anchorage, AK

Larry Smith, President
D&L Construction Company Inc.
P.O. Box 680
Cooper Landing, AK 99572

Steve Dehart
B&R Fish By Products
P.O. Box 4336
Kodiak, AK

Avrum Gross, Former Attorney General
424 N. Franklin
Juneau, AK

ACTION NARRATIVE

TAPE 02-07, SIDE A

CHAIRMAN JOHN COWDERY called the Senate Transportation Committee meeting to order at 10:04 a.m. Present were Senator Wilken, and Chairman Cowdery in Anchorage. Senator Elton was present in Juneau participating via teleconference. Senator Taylor arrived at 10:10 a.m.

CHAIRMAN COWDERY said they were there to take testimony on the issue of contractor claims. He said it was going to be informal and invited the participants to take a chair at the table if they were going to be involved. He said if you can't get a soft chair get a hard chair, that way the meeting won't last quite so long.

Everyone went around the table and introduced themselves.

- Chairman John Cowdery, Chairman of the Senate Transportation Committee.
- Senator Gary Wilken, 6th year representing West Fairbanks in the Senate. He is a wholesale food distributor and a part time temporary politician.
- Senator Taylor, Senator from Wrangell and member of the Senate Transportation Committee.
- Dave Eberle, Regional Director for Department of Transportation and Public Facilities (DOTPF), Central Region.
- Gordon Keith, Director of Construction and Operations for Department of Transportation and Public Facilities (DOTPF), Central Region.
- Mark O'Brien, Chief Contracts Officer, Department of Transportation and Public Facilities (DOTPF), Commissioner's Office in Juneau.
- Dick Cattanach, Executive Director, Associated General Contractors (AGC).
- Sam Baker, Attorney, Law firm of Oles, Morrison and Rinker and Baker; a large portion of their law practice is in construction claims. A number of contractors they have done business with have had claims against DOTPF.
- Kevin Brady, with Oles, Morrison and Rinker and Baker.
- Linda N. Silenski (ph) Henrikson, President and CEO of

Linder Construction. She was born and raised in Alaska as were all her ancestors before her for as far back as they can be traced. She and her husband have been doing construction together all across the State of Alaska for over 20 years.

- D.J. Whitman, General Manager, Seward Ships Drydock in Seward. They contract (indiscernible) for DOTPF and maintenance projects.
- Jerry Koenig, Project Manager, Swalling Construction Co.
- Andy Romine, Operations Manager, Swalling Construction Co.
- Jim Psenak, Owner, Jim Psenak Construction.
- Dan Libbey, Attorney, Oles Morrison and Rinker and Baker. He was there on behalf of the Associated Builders and Contractors of Alaska (ABC) as well.

SENATOR WILKEN said in the interest of full disclosure, he and Mr. Baker played junior high school basketball together in Fairbanks and had been friends for a long time.

SENATOR TAYLOR said he had the honor of litigating a matter with Mr. Brady. They concluded and resolved that matter so he has had an adversarial relationship with the firm.

CHAIRMAN COWDERY asked those people on-line to introduce themselves.

- Larry Smith, President of D&L Construction Company Inc. They have been in business for 20 years.
- Steve Dehart, B&R Fish By Products Inc. They are a general contractor in Kodiak.
- Avrum Gross, former Attorney General representing himself from Juneau.
- Ed Martin, Great Northern Construction at Kenai.
- Senator Elton, member of the Senate Transportation Committee, said he would be sitting in at Juneau until his caucus began.

CHAIRMAN COWDERY said they were going to have an informal hearing to resolve and bring to light some of the problems and perceived problems. He said the Associated General Contractors (AGC) came to him with this concern early on and supplied him with a packet of information. A letter in the file indicated there were major problems in claim procedures. Delays were commonplace; the costs to litigate claims are pretty minimal for the state but very expensive for contractors. He hoped everybody would read the file. He had a letter from the Commissioner of DOTPF and asked

someone from DOTPF to start off.

MR. DICK CATTANACH, DOTPF, said his letter dated January 9th was in response to a call from Chairman Cowdery. Chairman Cowdery had a copy of the Swalling claim and had asked how extensive the problem was and indicated an interest in having a hearing. Mr. Cattanach indicated to Chairman Cowdery what he thought the scope of the problem was and how over the last two years they had been working with DOTPF on the problem. He said he had not done a good job indicating the amount of work that had been done in the letter. He had with him a three-ring binder which represented some of the ongoing dialogue and where they were at that point in dealing with the problem. There had been movement but unfortunately the current system was still in place. Some of what AGC was going to recommend to the Transportation Committee would require and result in new legislation. He said DOTPF had been a good partner and it had taken them two years to get where they are. That was not necessarily all DOTPF's problem, they both have been busy and the work had not received the priority it probably should have. He wanted to make sure that everybody understood DOTPF has acted in good faith on this issue.

CHAIRMAN COWDERY said his relationship with DOTPF has been pretty good, better than in the past. He thought the fact that the commissioner was still the commissioner after all these years said something in itself. He said he did not want to get into the legal situation but wanted the participants to point out what is wrong with the system and make suggestions on how to improve it.

MR. MARK O'BRIEN said DOTPF entered into a process three years ago with AGC. They entered into a formal partnering agreement whereby they agreed to set out the guidelines for how their agency interacts with AGC on issues important to their constituents that they want to bring forward to DOTPF. It set up a very successful framework on how to deal with problems. There had been a number of issues they worked through with Mr. Cattanach and AGC and they expect to work through this and have some positive outcomes.

DOTPF realized there are problems with the claims process and there could be improvements. They had been working for two years on that issue and it had taken longer than they thought. They started looking at three basic premises. Those are the three things that AGC wants to work on with the claims process.

- Fairer in terms of selection of the hearing officers.
- Quicker in terms of the entire process.

- Cheaper, to try where they could to reduce the costs.

He said cheaper was probably the most difficult one they had in terms of an actual target because the claims process, if taken all the way through the courts, is an expensive process. They are struggling with that third target but thought they had some ideas that will improve that.

MR. O'BRIEN said the group together as a task group had developed a draft document they was circulating among their respective groups. It targets specific changes to the existing statute. The proposed mechanisms they are looking at putting in place are:

- An arbitration option for contract claims at \$100,000 or less. The contractor would have the option of selecting arbitration.
- Claims over \$100,000 would have the option of arbitration or the hearing officer process to be selected by mutual agreement.

MR. O'BRIEN explained that arbitration brought the idea of a quicker response on claims issues. They envisioned a multi-tiered approach depending on the value of the claim. It would detail the level of documentation in the claim and the amount of time the arbitrator would have to make the decision. This would put some guidelines around the process and the time frames at three different levels.

- Leave in place the option for the existing hearing officer process.
- Suggest DOTPF adopt regulations that govern the selection of hearing officers and arbitrators.
- By regulation, introduce the provisions by which the arbitrators and the hearing officers will conduct these claims adjudications.

CHAIRMAN COWDERY related a situation in the past where there was concern about the choice of an Anchorage Municipality arbitrator. The municipality claimed they paid his salary but he was unbiased. The contracting community thought the arbitrator knew where his paycheck was coming from. Chairman Cowdery hoped if they got into arbitration they would get a better balance than the arbitrators he had experienced in the past.

MR. O'BRIEN said the plan envisioned contractor participation in a selection process for arbitrators and hearing officers.

CHAIRMAN COWDERY said this was an informal hearing and anyone could participate. He asked they say their name and spell their

last name at least the first time for the record.

MR. O'BRIEN said when he started in that position one of the immediate changes he made was in the hearing officer selection process. That process now had input from both the contractor and the state. That had been in place for over a year. No hearing officer was selected unless they had been pre-approved by both parties.

CHAIRMAN COWDERY said some claims had been in place longer.

MR. O'BRIEN said before he came in and changed that process the hearing officer selection process was something where they just went and picked them. He was not sure how they were picked.

SENATOR TAYLOR said he appreciated the comments and thanked Mr. Cattanach for his summary sheet. He thought it was very objective.

He said he was kind of shocked to hear that the only thing that truly is available today is a hearing officer process. Arbitration is normally and routinely used throughout the construction industry by every other entity he was aware of. He asked if that was still the state's position.

MR. O'BRIEN said that is not the case. They had used arbitration on a number of claims. It is an option allowed currently under the statutes.

SENATOR TAYLOR asked if it was up to the discretion of the department as to whether or not to utilize that form of mediation.

MR. O'BRIEN said it would require a mutual agreement between the department and the contractor.

SENATOR TAYLOR said he could not imagine why any contractor would not ask for arbitration because DOTPF prepared the bid specifications. He asked if the bid specifications included the option of asking the department for arbitration if they both agree. He asked if that was part of the contract they were sending out.

MR. O'BRIEN answered no.

SENATOR TAYLOR asked if that only happened sometime later on when somebody had filed a claim. He asked if DOTPF would then say let's get together and try to solve this through arbitration.

MR. O'BRIEN said this process is listed in all of their bid doctrines that go out on the street. He said there was a provision in AS 36.30 that mentions something along the lines of nothing precludes the use of arbitration in dispute resolutions.

SENATOR TAYLOR said they were free as a department to include that as a basic element within their contracts if they wished.

MR. O'BRIEN said that was correct.

SENATOR TAYLOR said that would eliminate for all intents and purposes the hearing officer process and the appeal from the hearing officer and so on because both parties would have agreed in the contract to binding arbitration.

He said he appreciated the list of DOTPF claims and appeals. He was particularly concerned about those involving the Marine Highway System. He referred to the claim involving the Kennicott and Halter Marine, the original builder of the vessel. He was told at one time they had claims of somewhere in the neighborhood of \$30 to \$40 million.

MR. O'BRIEN said it was as high as \$50 million.

SENATOR TAYLOR said \$50 million on a \$90 million boat. The list indicated it was settled 11/26/01. He asked what the settlement was.

MR. O'BRIEN said there was a \$500,000 total increased payment to Halter Marine. It actually was less than that with money DOTPF owed them for some additional work they had done.

SENATOR TAYLOR said the claim that was filed by the Ketchikan Shipyards for work on the Columbia was not listed.

MR. O'BRIEN said that was correct. It wouldn't be listed because it is not a claim that had been appealed to the commissioner's office. He explained the original dispute is handled at the project level so within each region as the dispute arises it is attempted to be informally resolved. Then there is a series of escalators that take it up through a formal contract officer decision that is issued by the region. In the case of the Columbia there was never a formal claim filed so not only was there not an appeal to DOTPF there was not a claim at that time. There was intent to claim.

SENATOR TAYLOR said what actually happened was they brought in a

settlement judge to sit down with the two sides and the result of that was DOTPF paid \$1.5 million of that claim. He said probably more important to him than the amount actually paid was the stipulation by the department that they would select an expert in the maritime contracting, design and engineering field and have that person review the entire process of contracting on marine vessels that DOTPF Marine Highways had been going through. He said that was his understanding of the stipulation in the agreement.

He said if you read the press on that, DOTPF was constantly telling the people in Senator Taylor's district that Ketchikan Shipyards had no valid claim, that they were exercising their rights for liquidated damages. DOTPF of course had all the bonding tied up for Ketchikan Shipyards during that entire period of time. That meant they did not have any bonding capacity to bid on any of the ships scheduled to come up for maintenance in that facility. Had the matter not been resolved when it was DOTPF would have accomplished the bankruptcy of the third operator in a row in that state facility. He thought the political embarrassment got to some people and somebody finally sat down and said they need to get it resolved so it got resolved.

SENATOR TAYLOR said they were looking at a resolution coming out that basically had DOTPF admitting that they need to have their entire contracting processes reviewed by somebody that knows what they are doing with marine contracts. That to him was the most significant part of that settlement. He said the reason they were all sitting there was because the same problem appeared to be growing again, within the contracting field in general, across the state. He asked Mr. O'Brien to comment on that settlement and where they are with that expert and what advice, if any, had he provided so far and what did DOTPF expect to come out of that.

MR. O'BRIEN said unfortunately he was at a disadvantage because he wasn't involved in the process nor had he ever seen or read the settlement. He said he did know that the marine industry is a difficult industry in terms of contracting. It had been difficult when he was the contracting officer for the Alaska Marine Highway System a number of years ago. It has been fraught with difficulties in terms of getting ships in and out of yards in a timely manner. He said when you take a ship in you don't know until you open up the hatches what you have so, contracting for that in advance, in a fixed price situation, is difficult at best. He thought what Senator Taylor had seen in that case was a recognition on the part of the department that it is always willing to look at it's contracting procedures. There are alternate procedures in the marine industry that would benefit

the department and the contractors and they were willing to consider them. He said that was how he would characterize it.

SENATOR TAYLOR said the reason his state ended up paying an extra \$1.5 million and the reason his state did not collect any liquidated damages was because inherent within the department is a problem that he had seen throughout his life in Southeast. The problem is [the division of] design and engineering makes decisions and when they actually get into the boat or onto the ground they find out they were not good decisions and then they are faced with having to make a change order. There is a huge reluctance within the department to admit it made mistakes. Maybe it is institutional pride or arrogance. The poor state guy running the job on the ground has to get the job finished. He tells the contractor to put in his claim and they will work it out, just keep going. He said that was literally what happened throughout the Columbia contract. The design team and the engineering team actually required the purchase of various modules and equipment that had to go into that boat. They knew before they sent out those design specs that equipment could not be delivered within the time frames of the contract. They knew they couldn't make that deadline but when the deadline came, boom. George Capacci, General Manager of the Marine Highway System was on the front page of the newspaper saying we are going to get these guys because they owe this much per day for not getting the boat out. Senator Taylor thought the biggest problems he had seen were inherent within the department.

SENATOR TAYLOR said he watched road project after road project get designed in Juneau without ever sending anybody down to actually walk the ground and figure out what they were going to do. He said the 3rd Avenue bypass in Ketchikan was a \$50 million project all tied up and all screwed up and going through complete redesign. They had to stop the contract in the middle of the work. He said he could show them road projects like that all over his district. He asked what the department did for accountability when somebody screws up and costs the state an extra \$2 to \$3 million on a job that should never have happened.

MR. DAVE EBERLE said he could not say that he had encountered that situation directly. He said if their engineers screwed up he would be the one to stand up and say they had made a mistake. He did not try to hide mistakes they made and thought Chairman Cowdery could vouch for that on the airport. He was sitting down with the contractor and dealing with the issues and they are resolving them all very successfully. He said if they made a mistake he is willing to admit it.

SENATOR TAYLOR asked what happens with the personnel who made the mistake.

MR. EBERLE said he had not run into the problem where there was somebody who maliciously did something wrong.

SENATOR TAYLOR said he was not talking malicious he was just talking about some guy doing his job as best he can but he blows it.

MR. EBERLE said if he blows it they have to have someone check his work in the future. He can't fire a guy if he has made an honest error.

MS. LINDA HENRIKSON said the problem she saw was the department did not appropriately select a qualified person to administer the job. She said her case was about a \$3 million contract. The guy on site directing them in their work had not graduated from college. He had taken some biology courses and was a quasi fisheries biologist. The only construction he had been familiar with was installing parking lot lighting fixtures. The biggest contract their contracting officer had ever preformed was a \$250,000 supply contract. None of the folks on the project were qualified to administer the project. The only one qualified was the original project engineer who was a Department of Fish and Game employee. He reported to DOTPF but he retired. The fisheries biologist was incompetent and testified so at the hearing officer level. The contracting officer testified at the hearing officer level he was not competent to administer the project.

CHAIRMAN COWDERY said he had experienced similar situations. One of the things he wanted to look at closely in the future was having the design done and carried through, as is done in the private sector. If a project is privately designed, the design people and the engineering firm would do the contract management of the project. Sometimes if that is not the case it kind of invites problems.

MS. HENRIKSON said on her particular job the project manager, Bruce McCurtain (ph), resigned early. Less than a week before he resigned she had a telephone conversation with him where he disclosed to her that Montgomery Watson had a bond on that particular project for \$250,000. It was Mr. McCurtain's opinion in that telephone conversation that the state needed to go after that bond. She said he retired and that was the last conversation she had with him until two years later when they were at the hearing officer level.

They also did ad nauseam depositions, and Gordon Garcia testified in his deposition contrary to what the letter from the state says. Gordon Garcia testified they were paying Montgomery Watson to fix their design errors from the liquidated damages that they illegally withheld from her contract. When members of the Legislature asked them where the balance of the money for the contract was, they were informed that they had spent it on Montgomery Watson. She said they could check that with Senator Torgerson's office.

CHAIRMAN COWDERY said he had asked DOTPF very late, at 4:00 p.m. yesterday afternoon, to supply this committee with a copy of all the claims. It was too short of notice to prepare for this hearing but he was promised they would prepare it for them. He wanted to know when the claims were filed and when they were settled. He wanted that kind of information so they could do better work. He thought that information from DOTPF would give them enlightenment on just how long it takes.

MR. SAM BAKER said there were eleven different cases on the list and his office handled six of them. There had been a number of other instances over the last several years involving contractors they represented on claims involving DOTPF, which were not on the list. He said for various reasons he had no objection to that.

MR. BAKER said the problem they were dealing with is far more serious than what was being presented. He is the attorney for Alaska Ship and Drydock and intimately familiar with the problem involving the vessel Columbia. Early on in the dispute process, after his firm got involved, he talked to Mark O'Brien and was satisfied that DOTPF through the Alaska Marine Highway System (AMHS) recognized the seriousness of that problem far sooner than when the political aspects of it came to the forefront. DOTPF and its lawyers got on top of it and genuinely worked the problem to a mutually acceptable solution. He said he was not sure that would have happened if the political pressure had not come to bare but he knew they made a genuine attempt.

He said the problems they had gathered to talk about are very different from what happened in the Columbia case. He would like to see that kind of attitude reflected more. Mark O'Brien had exemplified attempts and attitudes that will help solve these problems.

MR. BAKER said these problems had been going on for a long time. He had been active in representing contractors in Alaska against DOTPF for some 30 years. His first major case was representing the contractor who built the Juneau Outer Drive. It was a joint venture of A & G and Stock & Grove, two very experienced old time

Alaska contractors. They had an enormously big problem with approximately 300 changes that were attributed to design related problems.

He said they needed to talk about the problems after the contractor gets a contracting officer decision. That is the end of the administrative process within the full control of the department. Then comes the appeal process through the hearing officer. If that is not satisfactory, you go to court. At this meeting they need to concentrate on the appeal process. He said to keep in mind, the way it works under the state spec, by the time you get to the appeal process you are probably a couple of years down the road from the end of construction. There are darn few contractors, unless they are pretty well heeled, that can even keep pace with that very laborious, evocative, difficult process.

MR. BAKER said in the Juneau Outer Drive situation they went to a dispute review board and the three people, who were subservient of the commissioner, ruled against them. They went to court and the department tried to enforce that adverse decision. The judge told the state to listen because he was going to give them an option. The judge said they either go back and reconstitute a fair, objective board or he was going to try the case de novo right there. The department selected a fair neutral board. They heard the case and awarded them about a million dollars and they settled it on the steps of the State Supreme Court on very fair terms about six or seven years after the job was over. It was a terribly laborious process.

He had a memorandum from one attorney general to another dated December 28, 1976. His firm had gotten it through discovery in that case. It talks about taking advantage of the superior resources of the state and prevailing through the process of just simple attrition.

CHAIRMAN COWDERY asked him to distribute that copy.

MR. BAKER said Joe Perkins (Commissioner, DOTPF) is a long time personal friend of his and he had known Dave Eberle for a long time. They were not talking about lack of competence because these people are extremely competent. He said they were talking about the lack of systems able to assure time after time that due process is going to be applied to each and every major dispute. In most instances these things get so large that the ability of the contractor to survive is at stake and they know it. DOTPF has the ability, by postponing the ultimate decision, to affect the contractors' ability to function. He said this administration is not doing anything like what was set out in that correspondence.

He said another part of the puzzle is, in each one of these cases, when they get to the hearing officer level, the Department of Law (DOL) represents the department. As good as DOTPF's intentions may be, they don't have any control over those lawyers. Each and every one of those lawyers has their own level of subjective interests and bias and they have a significant function in controlling what goes on.

He gave an example of a case where he represented a contractor who had a \$10 million contract on the Tok Cutoff. They encountered a lot of change due to the varying nature of the ground conditions in a couple of gravel sources. This resulted in a large claim of about \$2.5 million. After getting an adverse contracting officer decision they tried the matter in front of a three-person board headed by Woody Johansson (ph). Mr. Baker said Mr. Johansson's reputation in DOTPF in Alaska was magnificent. After two weeks the board gave his client nothing.

They then went through five weeks of trial in Juneau before Judge Allan Compton. The judge summoned the attorney general into his chambers on a holiday and basically forced the state to settle with that contractor for 100 cents on the dollar. The judge told the assistant attorney general he did not want to ever see him or his compatriots back in his courtroom with this pathetic level of preparation. They were so confident based upon being able to prevail in front of their own peers that they did not do much to prepare for the trial.

MR. BAKER said those are historical examples that set the stage for what is presently going on. Under the current administration he had never seen such a terrific level of controversy going all the way to the hearing officer level. He said it was great for his law business, they could hardly keep pace, but it was frustrating and aggravating to have very little control in assuring their clients they were going to get a fair shake against the department.

MR. BAKER said a few years ago he represented a contractor called Summit Paving who had a large contract in Fairbanks to construct a large highway project. They planned to dewater. The state had in its possession information from the Department of Natural Resources (DNR) that there was going to be a significant restriction on dewatering permits. His client got the job, applied for a permit and was turned down. He said that was not a surprise to the state but the contractors who bid the job did not know that. The hearing in front of the state's appointed hearing officer lasted a couple of weeks. Her name was Ballou, a local lawyer and she ruled completely against the contractor. They appealed to the local Superior Court and the decision was reversed and shortly after that the matter was settled.

The problem they have is going in front of a hearing officer selected by DOTPF. He said they just have no confidence whatsoever they are getting a fair shake. They were able to persuade the Superior Court that they did not on a very minimum standard of review. He said when going to court after an administrative decision the court cannot fully review it de novo, they have to review it on a limited record.

MR. BAKER said subsequent to that there had been other matters. For instance, Quality Asphalt Paving was terminated on a major highway project in Fairbanks right after the job began. It was thought that utilities existed in the right-of-way that would interfere with that project. After there was some postponement or suspension of work for a short period of time, the contractor submitted a significant claim for delaying the outset of his project. DOTPF did not like that so they terminated the contract for convenience, thinking it was just going to cost them whatever the contractor had accomplished and he had not really done much work. That resulted in about a \$4 million claim. They went through a full-blown hearing. It was disputed to the hilt and the hearing officer, a local Anchorage attorney who is one of the finest construction lawyers in the state, ruled in favor of the contractor. That matter is on appeal in the State Supreme Court because there are issues over some aspects of the decision. They would like to get the matter settled but they cannot because the attorney general is in charge of that case. The attorney general has sole discretion over what to do with it and there is no way anybody is going to settle with them.

MR. BAKER said he would like to see arbitration allowed across the board. He thought arbitration would settle everybody's problem. It would solve everybody's concerns about objectivity and time limits. Arbitration is designed to deal with both of those concerns and it deals with them extremely well. If DOTPF doesn't want arbitration and wants to maintain the hearing officer process, it needs to arrange for letting the contractor participate and assure that the hearing officer is going to be objective.

He said something also needs to be done at the contracting officer level. He said in Jim Psenak's case it took a couple of years to get a contracting officer decision and it was completely adverse. They then took the case to a hearing officer, Mark Roland, a magnificent retired judge. They don't have his decision but know they are going to get a fair shake from him. Mr. Baker said the problem occurred when they took the deposition of the contracting officer. She had never read the plans or the specifications and basically just incorporated in her decision the advice of her staff. He said there needs to be accountability in this process. It would cure a lot of problems if they were assured someone in the department, someone of the level of a Dave

Eberle, was there and accountable. Then if there were long delays or unreasonableness in the decision, somebody could stand up and address it.

CHAIRMAN COWDERY asked Mr. Eberle what exactly substantial completion meant.

MR. DAVID EBERLE said substantial completion is generally defined in the contract. He said Mr. Baker could probably address it better in terms of legalese but it means it is ready for beneficial occupancy. It may not be 100% complete but it is very usable to the owner. Landscaping may or may not be completed, depending on the contract. If there is some paperwork to be cleaned up, that is generally beyond substantial completion. He gave the example where the public is driving on the road. There may be some paperwork to clear up or there may be an electrical problem here or there that still needs to be ironed out but, generally speaking, substantial completion is when it is usable for the owner.

He said he wanted to comment on Ms. Henrikson's comment relative to competency of the people in the field. He wanted the record to reflect those were not DOTPF employees. The Department of Fish and Game (ADF&G) administered the project.

MR. KEVIN BRADY said in defense of the department there is a problem with the delegation of authority to various other state agencies that perform design functions and administration functions. In Mr. Psenak's case, the delegation of authority was to DNR and without question the project design was flawed. It was an abysmal lack of coordination, which they would never expect had the plans been reviewed by DOTPF. This led to a horrific claim and three and a half years of litigation.

MR. DICK CATTANACH said they were not there to attack DOTPF. They were gathered to look at the process.

CHAIRMAN COWDERY said he was allowing latitude but reiterated that was not the purpose of the hearing.

MR. CATTANACH thought Ms. Henrikson's problem was part of the problem with the process. He said Mr. Eberle was right to point out it wasn't DOTPF's people but a contractor has to put up with whoever the owner is. The process should be the same and should be fair and equitable and, in that case, it certainly was not.

MS. HENRIKSON thought the process would have been more fair and equitable if they had given her any DOTPF employee they had. She would have taken any one of them.

MR. D.J. WHITMAN requested the Chairman ask DOTPF to do a chart

that would show the real impact on a small contractor. He wanted them to start a chart with the contract date and completion date and show the full spectrum of what it takes to get to an appeal.

Seward Ship Drydock is a small company with about 50 employees and actual or gross sales of \$3 to \$5 million per year. In 1986, '87 and '88 he spent over \$350,000 just to get to a hearing. That was his profit for two and half years. He thought it was kind of skewed, they were asking why does it take so long.

CHAIRMAN COWDERY said, in defense of DOTPF, he had asked them to supply the information as late as about 4:00 p.m. the previous afternoon. He had asked them questions and they understood what he and Mr. Whitman wanted.

MR. WHITMAN wanted to applaud Senator Taylor. He said there is growing concern about dealing with the Marine Highway System in particular. He had been doing Marine Highway projects for over 30 years and in the last seven years he had seen many of these contracts end up in litigation or a potential claim. They never used to have that; it is a new problem. He thought Senator Taylor recognized the other major problem was with the design of the Marine Highway vessels. Many times designs are put out on the street, be it for a marine highway system or a road, that are inadequate to the needs of the highway or the ship. DOTPF's mindset is that is the contract and it will not change it. DOTPF cannot be convinced that its design is wrong and it forces the contractor into building, per contract, an inferior product or a product that is way outside the normal cost. It is always at the expense of the contractor because most of those projects are design and build. DOTPF needs to go back and correct the design at the very beginning.

MR. WHITMAN said the last point he wanted to make involved dealing with the contracting officers, their peers and those below them at the project engineer level. Many times project engineers are assigned to projects and do not have a clue of what the project is or what it entails. They do not understand the mechanics of it yet they are tasked with making decisions. They pass those decisions to the contracting officer and they are upheld time and time again and it is always in favor of DOTPF.

SENATOR TAYLOR thanked DOTPF staff for their comments. He said he was well aware of the process and the frustrations that were continuing to build about how the process itself wasn't working and takes far too long. Before the contract in Ketchikan "had gone awry" he advised Ketchikan Shipyards to consult with someone. He was pleased they found Mr. Baker who has a good enough working relationship with the department that people were trying to pull things together. The press certainly did not indicate the cooperative attitude between Mr. Baker and Mr.

O'Brien and things were getting resolved.

SENATOR TAYLOR said had that contractor been treated, as all other contractors seem to be, and been forced to go through the process and then showed up on this list, they would have been dead two years before they got to the final appellate process to hold a hearing in front of a hearing officer. They would have had absolutely no work that they could do with their entire crew in Ketchikan. The second largest employer in Ketchikan would have had no work because they had no bonding capacity. With no bonding capacity they could not bid on the next ship. If there were any claims in the next contract it would have wiped out that bonding capacity and all those bonds are then sitting there. There are not a lot of contractors out there with \$50 to \$100 million worth of bonding capacity. When they take out a \$5 or \$6 million bond and then another one, and both of those lie fallow because of claims, they very quickly run out of people and money.

He had two questions for the department. He said Mr. O'Brien had talked about the department moving into a form of binding or mandatory arbitration. He asked if that arbitration would include or did include a difference in attitude on the part of the department on the payment of interest. He said DOTPF had taken an attitude that was 180 degrees different from what was required of many other departments. Interest in the interim would determine whether people could accomplish things or lose totally.

MR. O'BRIEN said they approached AGC about introducing legislation to put interest back on the books. The department was not opposed to interest.

SENATOR TAYLOR asked if they were paying interest now.

MR. O'BRIEN said they were. The law went into effect October of 2001.

SENATOR TAYLOR said that was the law they passed. He thought half the stuff they pass gets vetoed.

MR. O'BRIEN said it was important to keep perspective as they hear claim difficulties described. Nobody denies there are difficulties or that one claim is one claim too many. He asked them to keep in mind that 98% of contracts from the Department of Transportation, the Department of Fish and Game and the Department of Natural Resources never go to claim. He said they were talking about 2% of the contracts.

CHAIRMAN COWDERY asked if on 98% of the contracts there were no claims or that the claims are settled.

MR. O'BRIEN answered in 98% of the contracts there is no claim.

He asked them to keep it in perspective.

AN UNIDENTIFIED SPEAKER said Linder mentioned the claim involving Montgomery Watson. He thought the letter stated there was an existing lawsuit that had been filed on that design.

MS. HENRIKSON said they gave them her money.

AN UNIDENTIFIED SPEAKER said that was an ADF&G project and he could not argue where money was spent. He said he could tell her the Attorney General's Office had filed a lawsuit on that design.

MS. HENRIKSON asked if they knew that ADF&G folks asked Montgomery Watson, the very people who were guilty of the design defects, to write the hearing officer's decision for them.

She wanted to make a comment about the administrative hearing level. She said when you go through the process you are forced to meet all the milestones in filing the claims and the project engineers and contracting officer's decisions while they actively go through this strategy of protracted conflict and winning by attrition. She read the conclusion from the hearing officer:

The question of liability is not difficult. Linder experienced different site conditions than contemplated in the contract plans and specifications. Gordon Garcia's journals and weekly reports and Bruce McCurtain's letter of October 7, 1997 concede the issue. Witness testimony underscores the finding. More importantly, the stipulated facts resolve the issue.

MS. HENRIKSON said she was never at the fault they said she was. The hearing officer stated that. Whatever level you prevail at, whatever degree, whatever the dollar amount, at the hearing officer level you are not entitled to attorney fees. They force you to have an attorney. She said her particular hearing lasted three and one half weeks at hundreds of dollars an hour. The depositions were another two weeks at hundreds of dollars an hour and you are not entitled to get reimbursement even though you prevail.

CHAIRMAN COWDERY said he would like DOTPF to respond on the interest. He asked if they had any problems if the court in the finality of a settlement awarded the claims and also awarded the attorney fees.

MR. O'BRIEN answered most of the projects the department does are federally funded. The provisions of the federal funds expended prohibit them to pay attorney's fees from those federal funds.

CHAIRMAN COWDERY said they could pay it out of DOTPF's budget.

MR. O'BRIEN said that is correct, if the legislature thought that was the position it wanted to take. If they wanted to fund those costs, they could pay them.

MR. KEVIN BRADY said his comment would follow up on Mr. O'Brien's comment that 98% of contracts don't result in claims. The fundamental problem was the contractor with the claim valued at \$10,000 to \$100,000 would prefer to walk away than expend the dollars chasing that money. They figure they took a loss on that one and they will make it up the next time around. He said there needs to be built into the system a way to address smaller claims in an expedited fashion. There needs to be some accountability built into the system. He pointed out:

Were there more incentives to sit down with a contractor and settle the case, to make the contracting officer's decision mean something. To utilize it as a benchmark against an award of proposal prep costs, attorney's fees, consultants' costs, there would be much more accountability in the way the decision [was] written. And I dare say that it would result in settlement of most of these claims.

He said, as it is now, from his experience, and he is an advocate for his clients, the contracting officer's decision is not impartial, it is not unbiased, it is usually not timely. It is the department's advocacy document. It is written for the specific purpose of providing a defense for the contractor's claim. That is at odds with the federal system wherein the contracting officer is viewed as an impartial neutral. Consequently, at the federal level, contracting officers do in fact award to contractors. What they have seen, right or wrong, is decision after decision that says the contractor is entitled to nothing. They then spend the additional \$200,000 to \$400,000 it takes to get the matter through to a hearing and they get substantial hearing officer awards. He thought the department would be somewhat embarrassed by that disparity between what they say the contractor is entitled to in the contracting officer decision (COD) and what the hearing officer ultimately awards. It is fairly clear the hearing officer sat down and went through the exhibits, listened to the testimony of witnesses and took a 180-degree view in most instances from the contracting officer.

MR. DICK CATTANACH addressed Senator Cowdery's question about whether DOTPF would look favorably to allowing the contractor to capture other costs of claims. He explained they had talked to DOTPF about it and made a proposal. In the claims process the state makes a judgment as to what the claim is worth. The state

says they will offer X. The contractor comes in with his claim and it is Y. Both the claim and the offer frequently tend not to be in the reasonable range. With this proposal, the hearing officer or arbitrator comes up with a settlement number. If it is more than the state was offering, the contractor would receive part of his costs as a percentage of the deviation between what he received and what he had been asking for. The whole idea is to make both parties more honest, to get them closer to a number. When they are close to a number then settlement is fairly easy and they do not have to go through the whole process.

CHAIRMAN COWDERY said he asked the question because he realized most of the projects they were talking about were done with federal funds but the settlements were generally state decisions. It would make the state's decisions unbiased or perceived as unbiased if they had to step up to the plate and pay expenses if it was not legitimate.

MR. BRADY said it had been explained to him that one of the major disincentives to settlement is if a matter is litigated through to a hearing, the Federal Highway Administration (FHA) will in fact pay 91% of any award. If the department has to actually sit down and settle they then must go on bended knee to the FHA to sell their position to get those federal funds. That builds in a disincentive to settling the claim. He said he did not know if that is the case.

MR. O'BRIEN said that was not the case.

CHAIRMAN COWDERY said right now in a dispute if someone from the private sector hires Mr. Baker he looks to his client for payment. He asked where the money comes from when it is defended by DOTPF.

MR. O'BRIEN said the costs of DOTPF to defend claims on federally funded projects run by the department are eligible for reimbursement.

CHAIRMAN COWDERY asked if that included attorney fees.

MR. O'BRIEN said it included the attorney fees and the hearing officer costs. Those costs are charged directly against those projects. He said if the state were to enter into a settlement agreement and agree to pay some amount on a claim prior to receiving a hearing officer decision, the exact same rules apply. They have to go the FHA and explain the merits of the case and whether or not they followed the contract. The FHA makes a decision on a case-by-case basis as to whether they participate.

CHAIRMAN COWDERY asked if that was an incentive or disincentive.

MR. O'BRIEN said it was neutral. It had no affect on causing them to take an action one way or another because under both scenarios they are eligible for federal reimbursement.

SENATOR WILKEN said Mr. Brady had made an assertion and Mr. O'Brien said no. He wanted to know what Mr. Brady wanted to say.

MR. BRADY said in one particular case he was approached by an assistant attorney general who mediated a portion of the dispute. The assistant attorney general's major concern was that Mr. Brady help them sell any settlement to the FHA. From that he drew his own conclusions but it was his understanding there is never any reluctance on the part of the FHA to fund an award by a hearing officer. He said Mr. O'Brien can either confirm that or not.

MR. GORDON KEITH joined in because he had been involved with every aspect of this and the Code of Federal Regulations (CFR) said federal participation was on a case-by-case basis. He recently settled a \$2.6 million claim before it went to an engineer's decision and got federal aide participation. On another case he had been involved with a court decision and it took almost five years to convince the FHA to participate. He said there was doubt that if you go to court and get a decision in Superior Court it is easier to sell to the FHA on a case-by-case basis but it is completely on a case-by-case basis.

SENATOR WILKEN said he was there as a member of the committee and also on behalf of a couple of constituents. He said they were talking about dispute resolution, arbitration, hearing officers, accountability, small claims resolution and delegation of authority. He said some contractors and the state were going at one another forever and it seemed strange to him they were sitting there dealing with basic dispute resolution issues. He said Mr. Baker had been active in the field for 30 years. He asked why it had not been taken care of 25 years ago. He wanted the opinion of Mr. Baker and former Attorney General Gross on what had changed. He said they were acting as a claims commission and a report would come back from the administration that would set the guideline for these five or six items.

MR. BAKER said from the standpoint of his office in the last four or five years they had handled at least a dozen significant claims against DOTPF or claims in which DOTPF participated through the hearing officer process. He had never seen it escalated to that level in the past. He had never seen so many claims. The reason why it escalated to the point where they are trying to do something about it is because they saw how much damage it caused. Jim Psenak was no longer in business because

of the long protracted delay in even getting his issues addressed.

MR. BAKER said they represented Seward Ship Drydock on a matter where they went through the complete hearing officer process and got completely shut out except for very minor compensation in a matter that Avrum Gross decided. He said they have great respect for Avrum Gross, he is a wonderful lawyer and has a great record but it has all been from the standpoint of expertise in defending the State of Alaska. Mr. Baker said he would have no confidence whatsoever in ever appearing before someone like that in terms of having him make a decision that was supposed to be fair and unbiased from the standpoint of the contractor.

MR. BAKER agreed with Mr. O'Brien that something needed to be done in order to make the system quicker, fairer and cheaper because there was so much of this going on and so little being done to cure the problem. He said Mr. Keith mentioned the Pernon (ph) and Thompson matter where both parties got together and settled. He wished all of their clients could have the assurance they were going to be treated that way but they were not. Each case seemed to be dealt with depending upon the attitudes of the individual participants on the part of the department. He said that is a bad system because everybody ought to be assured of having the same level of impartiality applied to their claim or their dispute so they would have an opportunity to get it settled by an impartial person who was trying to quicken the process and give it all the appearance of fairness even if they disagreed with the merits of the contractor's position. He told Senator Wilken that was why they were there.

SENATOR WILKEN asked if he heard him say it was an attitude change.

MR. BAKER said no. He thought for some reason DOTPF was taking tougher positions and tougher stands on claims than he had ever seen but he did not fault them for that. The only thing he faulted them for was not making more effort to get these things litigated or resolved through the administrative process more timely and more objectively.

SENATOR WILKEN said they had a \$1.4 billion capital budget for the last four years. He asked if the fact that there was more work on the street was part of the problem.

MR. BRADY said the DOTPF budget was at an all time high and he believed there was a very high level of attrition at DOTPF. He said he was not sure they had the quality staff to design,

support and administer all of the contracts. He thought that was a good reason to increase their budget and get them the qualified people they need.

He thought the fundamental problem was one of accountability. He explained when a contractor approached a project engineer with a claim and explained the situation they were supposed to work that out at the project level. But when that happens there is immediate reluctance on the project level for most project engineers to accept responsibility and deal with it right then and there. That usually led to acrimonious communication and was elevated up through the process. By the end of the job the contractor and the department are not really on speaking terms anymore and that carries through every step of the way right up to and including the hearing.

MR. BRADY wanted to see most of these cases settled before the need to come see a lawyer because he had seen Mr. Psenak in bonding jail for the last three years. He had seen what it did to Linder Construction and D & L Construction. He said these are vibrant companies taking risks, bidding construction projects, giving people jobs, doing the best they can and all they are asking for is to be treated fairly.

SENATOR WILKEN asked former Attorney General Gross if he could share his 25-year perspective on why they were now dealing with those basic issues.

MR. AVRUM GROSS said he wanted to respond to some of the things he had heard. He said he was an attorney in Juneau and had lived there for 41 years. He said he was a partner with Susan Burke who has practiced in Juneau for about 30 years. They have both been hearing officers for DOTPF and other agencies of state government for a little over 10 years. Because of that they have seen the hearing officer process from the inside. He thought since this hearing was about that process they might enjoy getting the perspective from someone who actually has been involved in these claims not as an attorney or contractor but somebody who actually participated in the decision making process.

MR. GROSS said he understood that 98% did not go to claim and he was going to talk to the other 2%. The other 2% had legitimate and honest concerns. He said he was not there to in anyway suggest their claims were not appropriate, should not be honored. He had been a longtime advocate of paying interest on contract claims. He had urged that to the department and had in fact awarded it. He agreed with Senator Taylor that attorney's fees

are appropriate to be awarded in contract claim disputes. He said he was sure Senator Taylor recognized, as he did, that full attorney fees are never awarded in court or anywhere else. He thought some benefits should be given to a contractor who prevails.

MR. GROSS explained to them the hearing officer process from the inside and what he had seen over ten years and as Attorney General. The hearing officer process is common all through state government. DOTPF is not the only agency where the hearing officer resolves claims. The biggest administrative claim that was ever held in this state was one he presided over with the Department of Revenue. All tax claims have to be resolved in the end by the commissioner before they can go to court. The Commissioner of Revenue, like the Commissioner of DOTPF or any other department where a commissioner is required to make a final decision, appoints a hearing officer to conduct the hearing for them.

He and Ms. Burke became involved in that process with DOTPF in 1991 when DOTPF came, unsolicited, to them. DOTPF came to them because they had a hearing which was simply too big for them to handle. They needed an attorney that had a large amount of experience in litigation and had handled fairly significant matters. It was the Tustumena refurbishment in which claims were made of close to \$7 million by the contractor and the state was claiming in excess of \$1 million in counter claims and liquidated damages. There were national law firms involved. The hearing took approximately seven weeks to present. The opinion he wrote was 300 plus pages. He said imagine if the commissioner had to do that himself. It would be ridiculous so the commissioner traditionally appoints someone whom he trusts to listen to the evidence and make a recommendation to him as to what he should do. He said that is the way it works in all agencies of state government. It happens for all disputed matters and is not unique.

MR. GROSS said since that time he and Ms. Burke handled about ten matters for DOTPF over a course of about eleven years. Most of them had been bid protests. In bid protests one contractor loses and one contractor wins but it is not a question of DOTPF against the contractor. The vast majority of his work has been in the contract claims area. He did three major cases, all of which are before the committee, the Tustumena refurbishment in 1991, the Terror Lake Hydroelectric Project in 1995 and the Tustumena engine refurbishment in 1997 at Seward's Shipyard.

He said for all of those cases the letter to the committee

suggested he and Ms. Burke are biased or that hearing officers are biased. The example of this given in the letter was the fact that Ms. Burke and he over eleven years have been paid something like \$400,000 for all the cases they had handled and, because they got that money, they decided those cases favorably to DOTPF in the hope of getting more business from DOTPF and they won't get it if they don't decide cases in favor of DOTPF. He said aside from the fact that allegation is awfully insulting as a personal matter, it is simply wrong. First of all there had not been a single example cited in the letters to the committee or the correspondence to the committee of what rulings had been made by any hearing officer, including himself or anyone else that were incorrect. He explained:

I'm sure that it is believed that these decisions were incorrect but I can't respond to any allegations because none have been made. There's just simply an inference that since the contractors ask for a lot of money and we were paid money to decide it that we must have been biased and therefore the contract that we made erroneous decisions.

In fact however, the two major cases that we're talking about here, the Tustumena and Terror Lake Project, were both taken to court after I decided them. And in the Tustumena's case, the multitude of decisions, which were made in that case both on the affirmative claims and the counter claims were affirmed 100% by the Ketchikan Superior Court. The contractor then took one remaining claim to the State Supreme Court, which ruled against the contractor five to nothing.

The second claim was the Terror Lake Project. That involved the excavation of the tunnels at Kodiak and it lasted several weeks. The decision was made. I gave the contractor slightly more than the contracting officer had recommended to the contractor, which was a substantial amount of money. But that also went to court and was upheld in its entirety by the Superior Court in Anchorage. So you know, when the inference here that because you get paid money, you know, you are going to make a decision for the commissioner is simply erroneous.

MR. GROSS explained if you get hired by the Commissioner of DOTPF to do a job, you do not do a good job for him by giving him a biased decision. If you give him a biased decision it goes to court. People inevitably will take it to court and they will spend a fortune and it will end up being thrown back to the

commissioner. He will have to have another hearing and the state will spend a fortune and the contractor will spent a fortune and nobody benefits. You do your best job for the commissioner if you do an honest, fair job, if you do what you think is right so you know if it does go to court it will be upheld in court so the commissioner will not have to do it again. He said that's why the commissioner hires you, not because you do something that gives the state money but because in the end you do something that holds up and does not have to be done again.

He said he understood the concern of the people at the meeting but he told them, from the inside, they do not act in a biased fashion, they try their best. They make honest mistakes of course, everybody does. He assured them that he had never been asked by a DOTPF member to bias a decision nor had he ever tried to. It would be in no one's interest, including the Commissioner of Transportation, to give a biased decision.

MR. ANDY ROMINE said he was Operations Manager for Swalling Construction and had a statement about the one claim where they actually went through the complete process. It was a claim for a project in Ketchikan and involved Susan Burke, part of the firm Mr. Gross was talking about.

The claim was submitted in September of 1997 for an amount of \$234,000. They got a hearing officer's decision on November 2, 1999, 25 months later and were awarded roughly \$46,000. They knew the amount of the claim would not allow them to have a full time attorney so they did most of the claim documentation and the writing of the claim themselves and then sent it to their attorney for review. They did hire an expert witness to take with them to Juneau when they went to try the case. The direct costs to them were \$55,000. In the course of trying to negotiate or provide information to the hearing officer they calculated at a later date their total costs. They included their in-house time, costs to go to Juneau and airfares, and it had cost them \$175,000 to litigate that claim.

MR. ROMINE said there are very specific requirements in the contract of when they were supposed to notice the state when a claim arose, when they were supposed to provide the documentation of the claim and how long they had to appeal decisions. They followed every step of the contract. He was surprised the state had the same requirements but in that case the state was typically 60 to 90 days late on every one of their decisions. He said if you take the number of days the state and contractor are given for the process, it is not that long, but they had no leverage to force the state to make a decision. He said Swalling kept on asking and asking and trying to go along with the process.

MR. ROMINE said they were not attorneys and they learned a few lessons in that hearing. They had a two-tiered case. It was a painting project and one of the claims was for excessive amounts of paint and one was for excessive amounts of rust. They did get a favorable decision by the contracting officer on the amount of extra paint on the bridge. They wanted to appeal the decision on the amount of rust on the bridge. He explained at that point it was simply a matter of convincing somebody that yes, extra paint would hide excessive rust. The hearing officer allowed the state to throw out their contracting officer's decision, which threw it back to zero. They had to start all over again. They had to prepare a case based on the whole process. He said they had spent all the time, effort and money to get where they were and they just wanted to focus on that one thing. He said he is not a lawyer but it just really surprised them.

He said the point was, when attorneys are talking people cannot do this by themselves. Somebody brought up a law book that was ten years old and there was a statement in there, they learned the lesson that they were never going to know those things. In this process, the way it is now, they have to have attorneys.

MR. ROMINE said the second issue was Swalling Construction had been in business for 55 years and had done a number of DOTPF contracts. That had been the one time they had to go to a hearing officer. They were currently involved in two cases. One had been appealed to the hearing officer and they were selecting a hearing officer in that case.

The other case is potentially going to be a claim. He brought it up because at the beginning of the meeting, DOTPF indicated they try very hard to work with the contractor to settle these issues. He said this case in Kodiak simply involves what part of a design and construction code is applicable to doing temporary work for that construction project. They presented a lot of information to DOTPF and asked them a week and a half ago for a 30-minute meeting to discuss their claim. Essentially DOTPF responded by saying they did not have the time to meet with Swalling. They asked specifically for the name of the person that decided they did not have the time to meet and DOTPF had not provided that name.

MR. ROMINE said they are trying to get out of the claim process. They negotiated with DOTPF for two or three months. DOTPF offered them roughly \$250,000 though Swalling had asked for \$388,000. That was the money they needed without going to claim. If they go to claim and follow all of the procedures it is probably going to be around \$700,000.

He said two months into the negotiations they got a call from the project engineer who said DOTPF was taking the \$250,000 off the

table and would give them \$125,000 because that is what it would cost them to litigate the claim. He said that is not a fair negotiation. At that point all they asked for was 30 minutes of time and DOTPF refused to meet with them.

MR. JERRY KOENIG said they requested formal responses to their correspondences to the state with the hope of having them for the meeting. This issue had been hanging out there with no response from the state since October or November. They carried on negotiations until they reached the impasse and received the phone call from the project engineer. Through those negotiations they had asked for the 30-minute meeting point blank. He quoted DOTPF: "The powerful people in the department don't have time to be dealing with these issues."

MR. KOENIG said if this goes to claim they are probably looking at \$200,000 or more in expenses. He said as a contractor they had a tough decision and had done a cost analysis and sent those to the state but had no response to date. He said it was a very frustrating process.

TAPE 02-08, SIDE A

MR. KOENIG said the state acknowledged early on it had made some errors in its initial appraisal. Subsequent to that it did not change its position but said it was wrong there but then it moved to another code. Swalling solicited an independent engineering firm to give them an interpretation. They handed the independent engineering firm the documents and did not explain where they were at but asked them what their interpretation was of their approach to the problem. The firm came back and reaffirmed that, in their opinion, Swalling was in compliance with the contract document. Swalling took that one step further and had the firm to go back to the code agency, which in that case happened to be AIFC, and asked what the intent of this code was when it was written. AIFC came back and reaffirmed that Swalling's interpretation of the code was correct.

MR. KOENIG said to date the department had refused to recognize, acknowledge or respond to that information. He felt like they were in a battle of coercion and attrition and their option was to commit legal funds. They are in the construction business not the litigation business. They want to reach an equitable resolution on this issue and would like a voice, would like responses and would like to have an opportunity to present their case to the people making these decisions. He did not think his request for a 30-minute meeting with department officials was at all unreasonable.

MR. EBERLE said all this was new to him. This was the first he had ever heard there was a problem out there that was not being

addressed.

He said one of the principles and one of the things he was going to speak about earlier was the formal process set out in the contract. That needs to be there and there needs to be some tweaking.

There is an informal process, which they advocate very strongly in the department, and it is called partnering. Basically it is treating everybody honestly and fairly on a business level. They actually have formal meetings before the contract starts. They agree to an informal process of elevating issues so they don't sit at the lower level and not get addressed. They literally create a hierarchy ladder whereby if it is not getting settled in a certain amount of time at that level they pick up the phone and talk to the people at the next level. You get the next level of the contractor and the next level of the department involved. If that doesn't get resolved, they have so many days and the next level gets involved and it ultimately gets to the contracting officer.

MR. EBERLE said he was very disappointed to hear that this was perking at that low level and that no one had picked up the phone and called Gordon Keith or himself to jump in and see what was stalling the process. He said this was the first he had heard of it and that is very unfortunate because they are strong advocates of solving the problems at the lowest level and, if they can't solve them, admit it and elevate them to the next level so they can get solved. He thought contractors as well as his own people, need to recognize that if they can't get a decision, elevate it. He thought they had fault on both sides of the table.

CHAIRMAN COWDERY said he had been involved in the partnering concept and had been the coordinator. He believed the little problems grow really big in a hurry if they are not elevated. It is human nature that nobody wants to admit they cannot settle a problem and have to give it to their superior.

MR. JIM PSENAK said he had looked at the information there and thought they were there to look at the process. He said, "It needs to be looked at more deeply than what you guys over there on that side of the table are looking at." He said first off the claims appeals are not really kept within these time frames, just like the fellow from Seward's Shipyards said. His case was listed as having February 6, 2001 as the date of receipt of notice from DOTPF. He noted:

You know I started out in this claims process in April of 1999. I got a decision from the engineer in June 2nd of 1999. I filed my appeal with the contracting officer July 23rd of 1999. He had 90 days to process.

You go through this 7 days if you and the engineer can't settle it. Then you got 14 days to file your claim. The engineer has 60 days to make a decision. You got 30 days after that to file to the contracting officer. The contracting officer has 90 days to make an answer. You got 14 days to file after that to go to appeal to the hearing officer.

After that it gets to that point there is no time limits. That's the end of it. The hearing officer can take two years if he really wants to. He can do anything he wants to up until that time that the hearing is done. Once the hearing is done then you've got 90 days to have a decision answer to the contractor. I don't know what's going to happen in my case because you're not gonna make your 90 days and I don't know where we're gonna go from there then.

MR. PSENAK explained they had his case down on their list as only taking a short-term one-year period. He was almost three years into the process on his case. The contracting officer received his information July 23rd of 1999. The 90 days gave him until October 23rd. On October 12th the contracting officer sent a letter that said Mr. Psenak had not sent all the information they needed on the claim so the contracting officer wanted another couple of months. He asked the contracting officer what information he was requesting. The contracting officer sent back a list of requested information that had already been listed on the claims appeal. Everything he sent the contracting officer was already there.

MR. PSENAK said he found out the contracting officer was moving the state offices during that summer of 1999 and did not have time to make that decision so he wanted more time. By that time they did not make the decision because they were going to supplement the claim with additional information they found. They were going to make one total decision. It drug out until January or February of 2001. Then Mr. Psenak finally got the contracting officer's decision.

MR. PSENAK said he immediately filed for the hearing officer. The hearing officer was appointed March 27th of 2001 and it was currently February 22nd of 2002, almost one year later and he was still not done. He said DOTPF had all those deadlines in their statutes. He referred to AS 36.30.620 (c) and read, "The time for issuing a contracting officers decision may be extended for good cause by the Commissioner of Administration." He said there was not a Commissioner of Administration letter anywhere from any agency that said they wanted to extend his contracting officer's time. The letter came from the contracting officer himself. He read further from the document, "If that decision is not made by

the date it is due the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor." [Sec. 36.30.620 (e)] He said he appealed a second time to a second contracting officer and gave him all the information and 90 days later the second contracting officer had not made a decision. Mr. Psenak sent a letter to DOTPF and they told him he had to wait until the contracting officer made his decision, which came a couple of months later.

MR. PSENAK said he was reading the state statutes that contractors have to go by. His claim was with the Department of Natural Resources (DNR) but he said DOTPF makes administrative decisions for DNR claims. He said in the case involving Linder Construction, DOTPF had said they were not DOTPF employees, they were ADF&G employees. He said that should not be relevant here due to the fact that DOTPF makes the administrative decisions on these claims.

MR. PSENAK read from the statute, "After the end of the hearing involving a procurement of construction contract the decision shall be made within 90 days [indiscernible] to all parties." After the 90 days you can go to a judicial appeal. He said it did not say in the statute what happens after the 90 days if there is no decision. He asked what action was taken against DOTPF if they did not make a decision. He said there is absolutely nothing that forces DOTPF to do anything in any of these state statutes. If they miss their deadline they just miss the deadline. If a contractor misses his deadline his claim is gone.

MS. HENRIKSON said he forfeits it.

MR. PSENAK explained the contractor has 14 days to file after he can't make a settlement with his engineer on the site. He said after arguing with the engineer for seven days about a particular decision or problem, you have to hurry up and make a claim to the same person you could not make a decision with. He said you know the engineer is not going to come back and change his mind. After you get this engineer's decision it goes to the contracting officer. He asked Mr. O'Brien how many times the contracting officer went against the engineer's decision.

He said he had multiple hundreds of thousands of dollars in his claim he could not recoup because attorney's fees are not legal for these claims. He said maybe interest could be recouped and maybe not. They did not know whether that would ever happen. He said no money ever came out of any DOTPF, DNR, or ADF&G employee's pocket. It all came out of the contractor's pocket. He said the attorneys did the best job and established the case very clearly.

MR. PSENAK said the thing that was so funny about his case was

DNR admitted it made a mistake on the design. Everyone from the designer to the project manager agreed there was a mistake. He said he caught them physically changing a computer disk he had given them for a pay item and they admitted they changed it. Thirty days after his project was done they terminated his project. He said that was the way it had gone since the beginning and he was sitting there almost three years later. It started nine months before that but the engineer's decision came out three years ago.

MR. PSENAK concluded that the process involved was skewed towards DOTPF and the state. DOTPF had no problems not meeting deadlines. He bet they would find the contracting officers' decisions did not go against the engineer's decision in more than one out of a hundred cases. The contractor has no options because DOTPF has all the options.

MR. LARRY SMITH said he was the President of D&L Construction Company Inc., a small contracting firm that has been in business in Alaska for 20 years. They were involved in a claim with DOTPF over a project called the Church Road Upgrade. It was a four-mile segment of state highway that was a federally funded project in Wasilla in 1998. They successfully completed the upgrade and had a final inspection in October of 1998. They had some problems on the project with utilities and went to claim. They were very fortunate in that they filed the claim in December of 1998 and it was resolved within eight to nine months. He said a number of things existed within the claims process that were abusive.

He thought the contracting officer's decision was a joke because in most cases the contracting officer did not even write the contracting officer's decision. In his case the contracting officer, Mr. Eberle, did not draft the decision. The assistant attorney general who defended the state against their claim drafted it. Then Mr. Eberle simply signed it.

MR. SMITH said their original bid for the project was \$2.6 million. Changes during the project brought it up to about \$3.3 million. They collected \$772,000 on an initial \$1 million claim. He said their hearing officer awarded them everything they asked for except \$50,000 in claim preparation costs, which he was not allowed to award because of statute.

After the hearing officer's decision, it went to the commissioner's office. The commissioner's office somewhat arbitrarily decided they were going to knock them down \$200,000. The hearing officer awarded them \$922,000 and they collected \$722,000. There is about \$92,000 still sitting in prejudgment interest his firm had not been able to collect. He said last year the legislature passed legislation allowing DOTPF to pay interest. They tried to get that legislation to be retroactive so

it would cover their claim from 1998. That was impossible so they still were unable to collect the interest on the \$722,000.

MR. SMITH said the major problem is there is absolutely no incentive for DOTPF to settle claims because it is not paying for anything. No matter what it does, it goes to the Federal Highway Administration on bended knee and basically gets reimbursed for everything. DOTPF is not accountable for anything in the entire process. They found during the discovery process in their claim that DOTPF used a document to encumber funds from the FHA. DOTPF sends this document down to the FHA asking for additional funds because of overruns here and there. He said their project manager sent documents to the federal highway people in Juneau asking to encumber funds for the additional costs of the same overruns D&L was claiming. They then turned around and refused to pay D&L for their claim until they went through this hearing process.

He said he did not want to come just to complain about the process but it is full of abuses. He empathized with Mr. Psenak and the other contractors who have been in the process for years and years. He said there are other contractors out there suffering from these same problems. The process absolutely needs to be changed and DOTPF needs to be made accountable for the things it is doing in this process. The contractor posts payment bonds and performance bonds for the risks they take. DOTPF people are not bonded and maybe they should somehow bond themselves or the state should bond them for the abuses they are perpetrating on the construction industry.

MR. SMITH said arbitration sounds great but they went through arbitration with DOTPF in their claim and spent 12 or 14 hours sitting in an office with their lawyers and DOTPF people and an arbitrator. It was a total waste of money and a total waste of time. DOTPF came to the arbitration saying there was no entitlement for their claim and no money and they walked out 14 hours later saying the same thing. He said they did not arbitrate in good faith. It was simply a tactic they used to delay the hearing officer process and to cost the contractors more money. They paid for half of the arbitration but D&L was out a few thousand extra dollars.

He said he heard Mr. Eberle talking about the partnering process. He said they partnered with DOTPF on the Church Road Project and he still felt the stab wounds in his back from that partnering process. This is a real problem especially for small contractors. D&L does \$2 to \$3 million worth of work a year and for them to wait 18 months to collect \$722,000, most of which they paid to the attorneys and the bonding company. They were lucky to have survived. He hoped that the committee would spend more time on this issue and thanked them for what they were doing. He hoped they understood it was a very big problem in the state and it

needed to be cleaned up.

CHAIRMAN COWDERY said that was the purpose of having the hearing. He hoped Mr. Cattanach would come back to the committee and help them work to correct the problem. He had worked with the commissioner in the past when the Governor wanted project labor agreements at the airport. He talked to Commissioner Perkins and had DOTPF by the budget. He told him he did not think that was fair and did not want to see it. Commissioner Perkins said to give him six weeks and he did solve that problem.

He talked about the St. Mary's Project, which Senator Wilken had brought to his attention. He was promised if he would hold off on the legislation that had passed the Senate, they would spend the summer in negotiation. That bill was still hung up in the House and he could not shake it loose. He said it is fine to work things out but he liked to have something in statute.

MR. STEVE DEHART said he was a small contractor in Kodiak. His comments had to do with the bid protest process and were directly in line with what some of the other people said. He protested a bid opening and got a favorable response from the hearing officer and it currently sat in Mr. O'Brien's office. The problem was they needed a decision because it had tied up their bonding for the previous six months and the only response they got out of Mr. O'Brien's office was he had 90 days to decide this. He added:

What is going to happen, which I was informed yesterday by the attorney that represented the state, is he is going to undermine this and circumvent the process by awarding the contract, him and the procurement officer. And the \$20,000 that I've spent in the last six months and the hundreds of hours I've put in to see this get to the commissioner's office is all going to be undermined by an attorney.

He did not feel they had any control over the attorney or there was anything they could do to stop this and that needed to be changed. The attorney represented the state but had no interest in a fair decision.

MR. DAN LIBBEY said he was with the law firm of Oles Morrison and Rinker and Baker and also there on behalf of the Alaska Chapter of Associated Builders and Contractors (ABC). He stated ABC's position of complete support of the upgrade of the administrative claims process. They also adopted the position articulated in the room particularly by Mr. Baker and Mr. Brady that an arbitration scheme would be a very effective scheme to implement into the process. If an arbitration scheme is not included as part of the statutory framework to the upgrade of this overall

process, then the hearing officer process should be revamped to reflect an unbiased procedure that put a good deal of accountability for the decisions that are made.

He said it would really be nice to see the overall claims process scheme address delegation of authority. If DOTPF delegated authority to ADF&G and DNR the same claims process should apply. The claims process would be the same no matter what state agency was delegated authority. The handling of small claims and the settlement of small claims should also be addressed in that statutory framework.

MR. LIBBEY said if there is an arbitration scheme suggested statutorily then the inclusion of interest in the scheme should be addressed. The October 2001 statutory interest provision in the state procurement code addressed interest in controversies raised to the procurement officer, which are then raised on appeal to the Commissioner of Transportation and then appealed to the Superior Court. He did not think it specifically delegated otherwise. There was sentiment that prejudgment interest should be allowable in claims against DOTPF but the department had taken a contrary position in the past. This statutory framework had remedied that but if an arbitration scheme was to be implemented statutorily then it may be appropriate to include a prejudgment interest clause with that so there would be no real issue. That could be a guidance of the overall upgrade of the administrative claims process.

MR. LIBBEY said in looking at the overall upgrade, the discussion of attorney's fees could be implemented. The way the civil rules of procedure are laid out in the State of Alaska, attorney's fees are not fully awarded. They are based on the level of contesting of the dispute, whether it is settled immediately, whether it goes on into the discovery phase, whether it is settled after trial. Depending on the level, there are different percentages that are collectable.

He thought Civil Rule 68 should be considered in this context because it would address accountability and it would also address the settlement of claims. That rule is in place and provides what is called the offer of judgment. If at the very beginning of the claim a party suggests a settlement number and that number then is accepted the claim can be resolved but if it is rejected the claim goes on. The party that prevails at trial by 5% greater than the offer is then entitled to 75% of their attorney's fees if the offer is made at the initial point. If the offer is made halfway through the claims process and the party prevails by greater than 5%, then it is a 50% award of attorney's fees. This really gives the incentive to settle the case early because the earlier you settle it, the less likely you will be exposed to the higher percentage of attorney's fees if it does go to full

adjudication on the merits. He said it is used in the Superior Court quite often and would be a very valuable tool for settlement and for accountability both. That could be a consideration that could come into the statutory framework in upgrading the claims process.

SENATOR TAYLOR said he appreciated the comments on offers of judgment. Rule 82 did not provide adequate compensation. He thought anyone who had practiced law for any period of time understood it was token compensation. He said a major insurance carrier in the State of Oregon, as a company policy, refused to pay any claim under \$1000 no matter how valid. They knew it would cost people way more than that to get an attorney and go to court and sue them. That caused the Oregon State Legislature to pass a law that if a company refused to settle and it was a valid claim the party would recover full attorney fees and double the amount at issue. He said when the tort reformers came along they killed all of that in Alaska.

He said it was fascinating to be discussing ways of finding incentives for settlement. There is no incentive greater than a contingent fee agreement. When every attorney in the room is on a contingent fee agreement, all of a sudden there is no benefit to running up a big tab against somebody. You don't have to run up \$50,000 to \$100,000 worth of debt against the client before you are going to settle his case. He said it was not just DOTPF that has been dragging its feet. He related a case involving the MRI machine at Bartlett Hospital and the Department of Health and Social Services as an example of another agency doing the same type of thing. He said legislators know this is going on because they keep hearing these types of complaints.

SENATOR TAYLOR said he thought there was a way to get this wrapped up and resolved. He applauded Dick Cattanach's efforts and Mark O'Brien's efforts for the conscientious way in which the people within DOTPF had been trying to find a way out of the morass. He thought the way out was to use something similar to what they use when they adversely take, through condemnation, someone's property. He explained their forefathers realized if the state came in with all its power and put I-5 through the middle of Chairman Cowdery's house they had to offer him a fair amount for his house. He explained the fair system they set up. Chairman Cowdery can bring suit against the state and if he can show that he can beat the state's offer in front of a jury by more than 5% he would get actual attorney's fees plus his judgment plus prejudgment interest. In that type of rare instance people got fully compensated if they lost their house. They do that in condemnation cases to keep the power of the state from being abused on the property owner. They could go to a system

that would do that. They could go back and try to repair the damage done to Rule 68 and the tort reform movement.

SENATOR TAYLOR explained Rule 68 used to say offers of judgment are offers of judgment and if you can go into court and beat that offer of judgment you get 100% of your attorney's fees. It was the insurance industry that came in through the tort reform movements and said it did not like 100%, they wanted 75% at one stage and 50% at another stage. Every time you whittled it down from 100%, you took the incentive to settle out. If they want strong incentives they can write strong incentives back in. He said he was looking at all departments, not just DOTPF.

SENATOR TAYLOR said he liked the concept of each side making an offer and then when they reach some finality you prorate it back. He was not sure how well it would work but it may be another workable mechanism.

SENATOR TAYLOR said he believed the rest of the construction industry, those not dealing with state agencies, found a solution to all this years ago. The construction industry found out a long time ago they could not afford lawyers and they could not afford the time to go to court. They could not have a huge ten story building all tied up for five or six years while they worked their way up to the Supreme Court for a decision on whether the guy who was building the building was right or not. They invented arbitration and in a month they get a decision. He thought binding and mandatory arbitration would take care of the big cases and the little contractor also. He asked, if it works for the rest of the construction industry and for the private sector, why it wouldn't work for the state. He said those were avenues of approach that had been successful for other people in the same circumstances. He said the Transportation Committee should really take a look at introducing legislation to accomplish that. He asked the participants at the meeting to share any additional ideas they came up with. He said if they could come up with something it would be beneficial to all parties and especially the state in the long run.

SENATOR WILKEN said he had five things he would like to touch on. He had two constituents come to him in the fall who were on the other end of the problem. They had a road project on 3rd Avenue in Fairbanks. Constituent B has an eight-store mini-mall and Constituent A has a little printing shop with three employees. Both came to him independently and said the state was beating the hell out of them. The state wanted to take their land and was not giving them fair value for it. They had been through all the hearings and the lawyers and they did not know what to do.

Senator Wilken told them he did not know about this so he went off to Juneau with this as a issue. Senator Torgerson had the same issue and as they were talking it came up. Senator Torgerson introduced SB 278 and he was one of three co-sponsors. SB 278 would require the state to make a better effort to try to have some resolution.

SENATOR WILKEN was in the print shop three weeks earlier because they were printing his survey. He told Constituent A he had a bill going and it would raise the level of the issue. Constituent A said he had settled. Senator Wilken asked him what had changed in the last four months. Constituent A said he could not afford it. They just beat the hell out of him. When Senator Wilken got back to Juneau he called Constituent B who said he was going to court. He would not breakeven if he won but those bastards were not going to beat him. Senator Wilken said that was the 2% he was there representing. He thought they ought to be proud of the 98% but it was the 2% like those speaking at the hearing and Constituents A & B that he was really there to talk about. He said they should not be placed in that position in those kinds of issues.

SENATOR WILKEN said the letters between Mr. Brady and Commissioner Perkins are entertaining and they could do what they wanted with them but obviously there were two sides of the story. He referred to the middle of page 2. He was disappointed in the statement and suggested DOTPF change its attitude. He read from the letters, "We negotiate for long periods of time," which he said Mr. Brady asserted. He continued:

The final sentence there says, and I think to my Constituents A & B - 'The contractor always has the option to break off negotiations and pursue their claim. The responsibility for prolonged settlement negotiations is shared equally by both parties.' I just simply don't see it that way. I would suggest that sentence ought to read, 'the responsibility to minimize prolonged settlement negotiations is placed upon the State of Alaska just because of the resources they have.' I think we, as the state should acknowledge that we're fighting and, not fighting, we're negotiating with small business people A and B and it's not their responsibility to carry the issue forward.

SENATOR WILKEN referred to arbitration. He asked Mr. Libbey in the scheme he mentioned whether he envisioned a traditional split - the baby arbitration - or would he envision a final last and best offer in these types of things.

MR. LIBBEY said he thought the scheme could work as Senator Taylor indicated. It would be a last and best offer if you rejected it and it went on into arbitration and prevailed by greater than 5% then it would be a full and actual attorney's fees award. It really gave that high incentive for settlement. It really allowed for parties to very objectively look at their positions and think realistically.

SENATOR WILKEN asked if that worked in the construction business.

AN UNIDENTIFIED SPEAKER answered that it does.

SENATOR WILKEN said he heard the comment about attrition through the department. He said all of them in the legislature heard that comment, not only on this issue but other issues as well. He was glad Mr. Brady had brought attrition up and he thought it was a problem in DOTPF and they have huge capital budgets funded by a lot of federal money.

SENATOR WILKEN asked Mr. O'Brien for the status of his report and when it was due. He wanted to know if the following list would be included.

- arbitration
- hearing officer
- accountability
- small claims resolution
- missed deadline on behalf of the state
- delegation of authority.

MR. O'BRIEN answered that all of the items Senator Wilken mentioned were discussed in the paper with the exception of delegation of authority. He said he had some comments on that and it was being addressed in a different way outside of the process they have with AGC. He said the other issues would be addressed. He and Mr. Cattnach had a copy of the report and had agreed to take it to their respective parties and gather input from their departments and their attorneys on this issue. He said this is the opportunity for both sides to go back and sit down and discuss this with their folks.

TAPE O2-08, SIDE B

AN UNIDENTIFIED SPEAKER said when we talk about modification of legislation we are talking about changing the State Procurement Code. He did not expect that to happen between the 15th of March and the end of the session. That meant this was something they could entertain over the summer and have hearings and look towards introducing legislation the following session. He said

they would look for advice.

CHAIRMAN COWDERY agreed they were getting down to the wire. The last day for the individual filing of bills was last Tuesday. Committees could introduce bills. Major legislation was often not completed in one two year period. He said that was why he appreciated all their help. He informed them Senator Taylor is Chairman of the Judiciary Committee and they would like to gather all the information and depositions. They needed everyone's email so they could email information to them. DOTPF would make a good effort and hopefully in seven to ten days this committee will have the list of claims information and he will share that with them. He told Mr. Cattanach to work with his staff and Senator Taylor on the necessary changes to meet their objective of making this work better.

AN UNIDENTIFIED SPEAKER said arbitration, which he had not thought about seriously until Senator Taylor suggested it, is a creature of agreement. If there is going to be some delay in going through this hearing process to change the procurement code there is nothing to stop the department from just, across the board, telling the contractors they are willing to arbitrate with them right now. That could be implemented by the time the hearing process is completed. He said they probably have a couple of positive examples of arbitration results, which ought to be really meaningful in assisting the whole process.

SENATOR TAYLOR said it was mentioned earlier that legislation is already on the books that allows for arbitration as an option. He would encourage the department to look at that. He was concerned they were going to waste another full year or year and a half before they would have some finality available for those people contemplating additional contracts. There is another building season coming up and hopefully contracts were going on the street for bid. He wanted people to feel very comfortable and know there is a quick, speedy and fair resolution process. That is what they are trying to build. He said they may not be able to accomplish legislation this year but they ought to get the rough parameters of a bill in and filed so they can have some hearings on them and maybe even carry on some hearings during the interim. He said he wanted to have a rough draft of the bill by mid March.

MS. HENRIKSON said something no one talked about was holding the hearing officers' feet to the fire. She said her hearing officer made his findings of fact and conclusions of law but he did not do the math. There were experts on both sides that said what the issues were worth. The hearing officer did not do any of that and it rendered his decision worthless and if you are the contractor

you are held over the barrel. You get the decision in January and the legislature is getting ready to meet. You have to decide whether you want to settle and get it funded while they are in session or wait another year for the next session.

She said she should be able to participate in the lawsuit going forward against Montgomery Watson and the state should not get a windfall when they would not even pay her attorney fees.

MR. O'BRIEN responded to Senator Wilken's question about delegation of authority. He said the department had just instituted what is called a contracting officer warrant system. It set up levels of delegation of authority, minimum training requirements and minimum experience requirements. It will be a formal system and has been adopted by policy. By July they will all have to have intern warrants. They recognize there is a need for training and there are issues out there and they are taking steps to address them.

He said the numbers don't support the idea that the number of claims has increased. He said he had records going back to 1988 and they averaged three claims a year and it has not changed.

CHAIRMAN COWDERY said they averaged three claims that are disputed.

MR. O'BRIEN said primarily most of the discussion is focused around this hearing officer arbitration process. He said he was talking about the claims that would be going to arbitration.

SENATOR TAYLOR said arbitration was not really a big major step for them to make because there are so few cases. He thought they could just implement arbitration. He said it would be good for the Governor to have Commissioner Perkins implement arbitration quickly and all of a sudden a whole bunch of problems would disappear. He suggested either binding arbitration so nobody can appeal and it is final or either side can go to court but there should be a disincentive to going to court.

CHAIRMAN COWDERY adjourned the meeting at 12:37 p.m.